86-362

Supreme Court, U.S.
FILED
AUG 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HOUSE OF WHEAT
and
WAYNE WHEAT

Petitioners,

vs.

CLIFF WRIGHT, et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Second District Court of Appeals
For Montgomery County, Ohio

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QUESTIONS PRESENTED

I

WHETHER "FALSE LIGHT" IS A VIABLE CAUSE OF ACTION WHICH CAN BE MAINTAINED WITHOUT PROOF OF "ACTUAL MALICE".

II

WHETHER THE PRIVILEGE OF NEUTRAL REPORTAGE CAN ONLY PROTECT FAIR AND IMPARTIAL REPORTS, WHICH REPORTS ARE NEITHER FAIR NOR IMPARTIAL WHEN THEY CONTAIN EMBELLISHMENTS OR INTERPRETATIONS.

III

WHETHER THE STATUTORY PRIVILEGE CREATED BY R.C. OF

OHIO, §2317.04 IS AVAILABLE TO PUBLISHERS OF DEFAMATORY MATERIAL WHERE THE MATTER REPORTED WAS NOT "PRESENTED, FILED, OR ISSUED" IN ANY LEGAL PROCEEDING.

IV

WHETHER THE PRIVILEGE GIVEN TO NEWSMEN AND CERTAIN OTHERS TO MAKE STATEMENTS ABOUT NEWSWORTHY EVENTS APPLIES WHERE THE PUBLISHER THEREOF ESPOUSES OR CONCURS IN THE DEFAMATORY CHARGES MADE OR OTHERWISE DELIBERATELY DISTORTS THE STATEMENTS IN LAUNCHING A PERSONAL ATTACK.

PARTIES BELOW

The caption of this case not containing the names of all the Respondents, the following names are disclosed:

(1) Clifford Wright

(2) Jack Hurley

(3) Richard Nordstrum

(4) Miami Valley Broadcasting Corp.

(5) Channel 7, WHIO TV

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PETITION FOR WRIT OF CERTIORARI
To The Second District Court of Appeals
For Montgomery County, Ohio

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioners, House of Wheat and Wayne Wheat, respectfully pray that a Writ of Certiorari issue to review the

judgment of the Second District Court of Appeals, which judgment became final on April 9, 1986 when the Supreme Court of Ohio denied further review.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review is set forth at Addendum "A" in the Addendum to this Petition, at page Add. 1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Addendum "B", at page Add. 2, et.seq.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on April 9, 1986. The time for seasonably filing this Petition was extended to and including August 7, 1986. (See Addendum "C", infra, p. Add.

109.) The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (17).

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are set forth as Addendum "D", to this Petition.

STATEMENT OF THE CASE [1/]

As appellants, Wayne Wheat and The House of Wheat, appealed from the judgment of the Court of Common Pleas in and for Montgomery County, Ohio, where summary judgments were granted to the defendants on various tortious claims made against them for damages. The

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1/ All references to the transcript of this case are designated by the prefix "R". All references designated App. _____ are to the separately bound Appendix filed in the Court of Appeals. The references designated Add. " ", p. ___ are to the Addendum to this Petition.

appellants also appealed from the jury verdicts rendered in favor of the defendants and from the final judgments and orders entered thereon. This appeal, on questions of law, resulted in an Opinion and Journal Entry affirming the trial court's actions in the various contexts in which it was assailed. It also validated the verdicts rendered by the jury.

The petitioners filed a civil action against the various respondents herein charging defamation, invasion of privacy, and interference with economic relation. These actions were based on the content of certain television news broadcasts, wherein the respondents (news media employees of a television station) made the charge that Wayne Wheat and The House of Wheat were responsible -- in other words criminally liable, for disposing of

the human viscera that had been found along the banks of the Great Miami River.

Indeed, the public was made aware that the acts attributed to the petitioners were criminal offenses. Additionally, the broadcasts included an interview with Wayne Wheat that had been surreptitiously filmed or taped. As to this specific broadcast, the facts show that while Wayne Wheat did consent to being interviewed by Cliff Wright, the newscaster, he expressly refused to give his consent to being recorded or filmed. Simply put, Wayne Wheat only consented to being interviewed if it was not recorded and reported (App. 927-930). The facts, as testified to by Wayne Wheat, both on deposition and at the trial, showed one of the respondents (Nordstrum) put the camera down and took a seat before the

interview started. Doubtlessly this act was wilfully designed to conceal the fact that they fully intended for Wayne Wheat to be taped despite his expressed wishes to the contrary. Also, it should not go unnoticed that what was, in fact, broadcast to the public was not a continuous segment. Rather, pieces were spliced together so as to make it appear to the public that the broadcast segment was an intact and continuous interview (R 721).

Next, the proof also showed the public was specifically told that Wayne Wheat had in fact utilized a "dumpster", said to be on The House of Wheat's property, to actually dispose of human viscera (R 117). (Also see App. 244.) This happened despite the incontrovertible proof that neither of these petitioners had ever had, owned or

used, a dumpster for any purpose. Their proof further showed there had never been a dumpster on their premises as represented, both, pictorially and verbally in the assailed broadcast (R 982, 998).

The facts reveal that while the broadcasters continued to maintain they had personal verification from the company who actually serviced the "dumpster" referred to by them in their broadcast, that they had reportedly seen viscera therein (App. 519, 533) the judges involved in this case allowed them to find refuge behind what was said to be their privilege. (See R 885-893 and App. 70, 155.)

Other facts revealed what truly must be a classic example of how to injure a target. Here, we refer to the fact that these broadcasters actually told the

viewing public that a "complaint" had indeed been filed against Wayne Wheat for instructing a former employee to improperly handle human viscera (R 117).

While the above recited proof shows the respondents simply were not interested in whether or not their comments were true, other facts revealed (as an additional predicate for our Motion to Compel) that the petitioners contacted and received disclaimers from all the dumpster companies in the Dayton area. This effort was made by the petitioners in quest of any company that could possibly have claimed to have done business with, either, Wayne Wheat or The House of Wheat. Despite the sufficient assurances that none of the companies ever told the broadcasters anything that could possibly have served as a basis for the testimony given as some verification

for these broadcasts, the Court failed to order disclosure and to compel answers to various specified questions. We contend this too was erroneous and prejudicial.

As will be further developed as part of various arguments made below, the trial court granted (in part) the broadcasters' Motion for Summary Judgment. This ruling by the Court for all intents and purposes actually decimated the petitioners' case. Indeed, the jury ultimately found the broadcasters not guilty.

II

Conceding, as we must, that our petitioners certainly had the burden of proving the falsity of certain statements made, "of and concerning" them, certain segments in Dr. Davis' (the coroner)

evidence should be deemed conclusive proof this burden was fully satisfied. Here we refer to the following testimony:

> Q. ... Now, this is the statement released by Mr. Baldridge to the public. The statement reads: "The House of Wheat Funeral Home is under investigation in connection with the finding of some bags of human organs in the Great Miami River. The organs were traced to the House of Wheat and the Coroner's letter states that the funeral home signed for the bags and viscera at a local hospital and performed the funeral." Now, did you trace all the bags of body parts that you found to St. Elizabeth's Hospital and through St. Elizabeth's Hospital to the House of Wheat Funeral Home?
>
> * * *
>
> MR. WILLIS: I understand that. I'm just asking whether or not that's a true statement. My question to you is: Did you trace all the organs that were found along the

banks of the Miami on the 29th and 30th through St. Elizabeth's Hospital to The House of Wheat?

A. No, we did not. All six bags were not traced to the House of Wheat. One bag was.

Q. So that's a false statement, isn't it?

A. I suppose so because -- Yes, that's -- The organs were traced to the House of Wheat, and the Coroner's letter states that the funeral home signed -- The Coroner's letter states that the funeral home signed for the bags and the viscera at the local hospital and performed the funeral. (Reading) Which letter are they referring to in that?

Q. They're referring to your letter.

* * *

A. To the State Board of Embalmers?

Q. Yes. Second page. I'm sorry.

* * *

A. (Witness reading to himself.) What my letter ... says is: "In interviewing Dr. Kramer, the autopsy physician, it was learned that after completion of the post-mortem examination at St. Elizabeth, the viscera was placed in two plastic bags, one of which was placed in the body cavity and the other placed with the body to be picked up by the funeral director. . . The remains were then placed in the hospital morgue and later turned over to the House of Wheat Funeral Home."

Q. Yes, now here we're talking again about the finding of some bags -- That's more than one -- of human organs. Then the organs -- again referring to those that were in the bags -- were traced to the House of Wheat and through the House of Wheat -- were traced to the House of Wheat and to the funeral home. Is that a true statement?

* * *

A. We did not trace all six bags to the House of

Wheat, no.

* * *

Q. This says on July the 29th and 30th six bags were discovered along the banks of the river near West Carrollton. The human organs were traced to St. Elizabeth Medical Center partly because the bags were marked. Is that a true statement?

A. Not precisely. It's not precise. The bag was traced to St. Elizabeth Medical Center, not the bags.

Q. Okay. That says bags?

A. If you're referring to all six bags, again all six bags were not traced to St. Elizabeth Hospital to my knowledge.

Q. And it also says the bags were marked. Is that a true statement?

A. The bag was marked, but not the plurality.

Q. That means that that's a false statement, doesn't it?

A. Well, one of the bags was, one of the bags.

* * *

Q. Is this a true statement? "Investigative sources tell us they traced evidence to St. Elizabeth's Hospital where bodies and organs were picked up following autopsy, following the autopsy; is that a true statement?

A. That is not precise. It's not. They picked up a body.

Q. A body, a body. And this word here, bodies, that's plural. That means more than one?

A. That's correct.

* * *

Q. You understand from "the" viscera refers to the viscera that the Coroner's -- that had come into the possession of the Coroner's Office?

A. The viscera could be -- the viscera, the multiple organ parts in one bag or several bags.

* * *

A. I think's it's -- that particular one, now the

others are but this one is particular, for dumping the viscera. Viscera is plural, it could be viscera within one bag or viscera within six. He may have meant one bag or more, but that's a true statement as far as I'm concerned.

Q. Yes, but if he meant one bag, that would have been something that he could have easily said, right?

A. I don't write up the newscast. Mr. Hurley and Mr. Wright, I'm sure collaborated on the content of that newscast.

Q. Thank you. . . . Statement made March 2nd, eleven p.m. "We know a little more tonight about that grisly discovery we told you about yesterday. Six bags of human organs were found here along the banks of the Great Miami River in West Carrollton last July. Investigators have traced the bags back to St. Elizabeth where autopsies on the bodies were performed." Is that a true statement?

A. All except bodies. That's plural. The body that we had -- The single

body we had traced was traced back to St. Elizabeth Hospital. That's true, but the statement was such, where autopsies on the bodies, plural, were performed is inaccurate.

Q. What about this up here: "Had traced the bags back to St. Elizabeth?" Again in context, we're talking about six bags?

A. And that, too, but again we did not release the precise information to anyone as has already been stated.

Q. But the fact remains that's a false statement because bags were not traced to St. Elizabeth and you cannot say even today that those other bodies other than Delma Shine were autopsied at St. Luke -- I mean, at St. Elizabeth's Hospital; that's true, too, isn't it?

A. That's true. (R 966-974.)

In taking specific exceptions to the jury charges (R 1721-1728 & 1729-1730), one of the points emphasized to the Court was that:

> We object to the Court's instruction whereby the Court in one breath stated that a privilege could be vitiated by malice and the next breath stated that malice was not a part of the case. We feel that's ambiguous and confusing, and that it magnifies the harm that was delivered to the Plaintiff's case when the express malice was eliminated, although the evidence certainly set forth sufficient elements to require its inclusion. (R 1730.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The decision by the Ohio Court of Appeals that its code (i.e., R.C. of Ohio, §2739.04) provides an absolute privilege of non-disclosure deprives libel plaintiffs who must prove actual malice of their constitutional right of due process. One of the earliest cases involving compelling disclosure of confidential sources in a defamation action is Garland v. Torres, 259 F.2d 545 (2d Cir. 1958), cert. denied, 79 S. Ct. 237 (1958). There the Court, in ordering

disclosure, accepted the premise that compulsory disclosure may infringe upon First Amendment freedoms. However, the Court reasoned that the plaintiff undeniably had a right to present her claim to its fullest. In so doing the Court effectuated a balancing standard wherein the interest to be served by compelling disclosure must outweigh the impairment of those related to the First Amendment. This balancing process has been widely adopted. See, e.g., Miller v. TransAmerican Press, Inc., 621 F.2d 721 (5th Cir. 1980); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

When, as here, the libel plaintiff must plead and prove actual malice, it becomes most essential that the plaintiff must be allowed to discover what the publisher knew about his subject.

Critical to what the publisher knew is how, and frequently from whom, the information was obtained. For indeed if the source can be shown to be totally unreliable, then inferences of actual malice can arise.

In our case the respondents published glaring misinformation to the public asserting that petitioners had a dumpster on their property into which they were disposing viscera. Not only did these petitioners deny disposing of viscera in that manner, they categorically denied ever having had, or having used a dumpster. On the other hand, the newscaster, Wright, adamantly maintained that he had obtained verification from an undisclosed dumpster company (allegedly the company that actually provided service for the petitioners' supposed dumpster). Faced

with these facts petitioners contacted the local dumpster companies and each response received denied providing service to the petitioners.

The petitioners contend that if R.C. of Ohio, §2739.04 provides an absolute privilege, then individuals such as the petitioners can be effectively barred from having their claims properly aired because of the arbitrary denial of access to information which could prove actual malice by showing:

(a) the asserted existence of a source is a fabrication; or

(b) the source was so unreliable that reliance upon and publication of his information was a reckless disregard for the truth.

ARGUMENT NO. I

False Light Is A Viable Cause Of Action Which Can Be Maintained Without Proof Of "Actual Malice".

The separate categories of "invasion of privacy" torts have been specifically recognized in Ohio's various Courts. See, Jackson v. Playboy Enterprises, 574 F. Supp. 10 (S.D. Ohio, W.D. 1983); Housh v. Peth, 165 Ohio St. 35, (1956); Guccione v. Hustler, 64 Ohio Misc. 59, 412 N.E. 2d 952 (Ohio Ct. App. 1981); Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224 (1976).

A. Invasion Of Privacy

This tort is based upon the overt acts of the intruder and not upon the subsequent publication of information. While the tort derives from

common law trespass, intrusion claims now arise in three general categories: surreptitious conduct as contended under our facts, traditional trespass, and instances where consent to enter into a secluded setting for one purpose has been exceeded by the invitee, as was the case herein. See, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); LeMistral, Inc. v. Columbia Broadcasting System, 61 A.D. 2d 491, 402 N.Y.S. 2d 815 (1st Dept. 1978).

The arbitrariness of the court's stated conclusions (App. 365-366) is exposed by the fact that nowhere in the Record is it established that Wayne Wheat spoke "openly", a conclusion that ignores facts showing (at least from Wheat's perspective) that there were terms and conditions. Even this is not all, subsequent acts by Wheat's counsel have

nothing to do with his privacy status on an earlier date.

B. False Light

In Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974), this Court found that the evidence was sufficient to support a finding that the article portrayed the family in a false light through publication of knowing or reckless untruths. The main "untruth" relied on by the Court was the statement that Mrs. Cantrell was "wearing the same mask of non-expression she wore at her husband's funeral" when, in fact, the reporter had not interviewed or seen her for this follow-up article.

The question left open by the court in Cantrell is whether, in view of Gertz, "a State may constitutionally apply a more relaxed standard of liability [than

"actual malice"] for a publisher or broadcaster of false statements injurious to a private person, or whether the constitutional standard announced in Time, Inc. v. Hill, 385 U.S. 374 (1961), applied. However, the trial court here ruled that constitutional malice was required (App. 368).

In our judgment, these petitioners were placed in a false light by the respondents. Indeed, either directly or by innuendo they were made to be guilty of a criminal offense, or at the least, guilty of professional misconduct.

What can be distilled then is that genuine issues of material facts existed. At a minimum, these included but were not limited to, (1) Did the respondents' act exceed the scope of the petitioners' consent? (2) Were the broadcasts a distortion? (3) Were the broadcasts

embellished? And (4) Were the broadcasts true? Given that, summary judgment was inappropriate as to all issues of invasion of privacy.

ARGUMENT NO. II

The Privilege Of Neutral Reportage Can Only Protect Fair And Impartial Reports, Which Reports Are Neither Fair Nor Impartial When They Contain Embellishments Or Interpretations.

For any report to be "fair and impartial" it obviously must be without embellishment and the publisher's interpretation. However, these broadcasts were gaudily embellished and interpreted. In point of fact the respondents added visual effects, aids, accoutrements, and their own interpretations. One instance of

embellishment was showing a picture of a dumpster, which was pictorially alleged to have been the petitioners'. Also, the respondents stated as fact throughout the broadcasts (among other things) that the petitioners had received the viscera (App. 238), and that Landry had filed a complaint (App. 242). They even added their own interpretation of the evidence:

> Cliff Wright: With its power to investigate and the power of subpoena and with all evidence pointing to Wheat Funeral Home, (App. p. 250).
>
> Cliff Wright: Meanwhile, the coroner's investigation continues and all thus far appears to point to the House of Wheat Funeral Home on Williams Street (App. p. 247).

The inclusion of their own embellishments and interpretations void any contention that the broadcasts were "fair and impartial." Cianci v. New Times Publishing, 639 F.2d 54 (2nd Cir.

1980).

ARGUMENT NO. III

The Statutory Privilege Created By R.C. of Ohio, §2317.04, Is Unavailable Where The Matter Reported Has Not Been "Presented, Filed, Or Issued" In Any Proceeding Before The Board.

In it's grant of partial summary judgment, the court identified the central issue as being "whether the broadcasts constitute a 'fair and impartial report' of official documents presented to the Board of Embalmers and Funeral Directors of Ohio ("Board") by the Coroner or other persons" (App. 371). The blunt fact is that the most critical issue was resolved by the court on the basis of the flawed premise that is clearly indicated in the court's framing of the issue as quoted above.

Clearly then, by any interpretation of the concept here involved there can be no privilege. This is not only the position taken by a majority of American Courts, it is the law in Ohio. See, R.C. Of Ohio, 2317.04 and Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E. 2d 5 (1945). While this argument was raised on the appellate level, that court refused to address its merits by ruling that the party who prevails on a Motion for Summary Judgment cannot challenge the ruling. What the Court failed to realize is that what is being challenged is the delineation of the issues for trial.

Simply put, there were no proceedings before the Board. Therefore, when the court framed the issue for trial, it did so despite the clear lack of any evidence supporting the existence

of a formal proceeding. Simply stated then, the court erred in several ways. First, as discussed above, the court made a factual determination that some "proceeding" within the meaning of §2317.04 was being conducted by the Board, which finding was not proper in a Motion for Summary Judgment.

Second, while the petitioners contended that the letters had not been "presented to" the Board (App. 300 et. seq.) and the contrary position was adopted by the respondents, the court resolved this factual determination in the respondents' favor (App. 371), despite the clear rule that the facts alleged by the petitioners were to be taken as true.

ARGUMENT NO. IV

The Privileges Given To Newsmen And Certain Others To Make Statements About Newsworthy Events Is Qualified; Hence, Does Not Apply Where The Publisher Thereof Espouses Or Concurs In Any Charges Made Or Deliberately Distorts The Statements To Launch A Personal Attack.

(A)

The qualified privileges, including the one created by R.C. of Ohio, §2317.04, were relied on by the Broadcasters (App. 202-211) and the courts below as a cure-all or panacea (App. 371 & R. 1713-1714). However, this Court will surely recognize that any right to report on proceedings before an

administrative body cannot be extended to reporting unsworn accusations stated in a letter addressed to such agency. Cf., Village of Grafton v. American Broadcasting Company, 70 Ohio App. 2d 205, 435 N.E. 2d 1131 (1980).

As to these issues, the views expressed in Sanford v. Boston Herald-Traveler, Corp., (cited elsewhere), are most persuasive. Here, the Sanford court held "the right to report court proceedings does not extend to reporting accusations contained in papers filed [even] in a court and not yet brought before a judge or magistrate for official action." Id., at p. 6.

So postured, what actually has happened here is the whole doctrine of qualified privilege was tortured by the courts below and the broadcasters. For

not only was there the lack of a requisite proceeding to serve as a basis for any reliance on the asserted privilege, the letter itself failed to qualify as a document. Indeed, what was referred to as a document hardly furnished any basis for the defamatory statement that an official complaint had been filed with the Board (App. 1160).

(B)

Also, in this case the trial court instructed the jury that the "defense of qualified privilege gives protection to any defendant making a false publication where the broadcaster and the public have a common interest" (R 1713).

Here it seems the court was, first of all, fully convinced the reports made to the public concerning the dumpster episodes were, or could be, deemed (a) a fair and true report to the public of an

administrative proceeding. Or, (b) an example of the privilege allowed newsmen to report fairly and accurately, statements made by public officials (-- here, the coroner, who wrote the letter containing the defamatory falsehoods to the Board of Embalmers and Funeral Directors of Ohio).

As argued elsewhere in this Petition, the news accounts here involved cannot be defended as being related to any official proceeding. And, just as surely a defamatory statement attributed to a third party in a letter can hardly be said to have the protection allowed by the court's instruction. See, Gobin v. Globe Publishing Co., 216 Kans. 223, 227-228; 531 P. 2d 76, 80-81 (1975).

It is, of course, very true that Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir. 1977), did

enunciate, what some have called, a new constitutional privilege of neutral reportage. Under this doctrine, protection is afforded statements made by public persons about newsworthy events, where the report made thereof is fair and accurate. However, even this privilege does not apply where, as here, the publisher thereof "espouses or concurs in the charges made ... (or) deliberately distorts (the) statements to launch a personal attack .... In such instances he assumes responsibility for the underlying accusations." (Id., 120).

Putting aside, for a moment anyway, the statutory privilege, it seems clear enough that the privilege of fair comment that existed at common law applied only if the facts relied on were true and was lost if the disclosed facts were not true -- the situation here. See, Cianci v.

New Times Publishing Co., 639 F.2d 54, 63-67 (2d Cir. 1980).

In this case it seems so very clear that both the trial court and our respondents, and possibly the Motion judge as well, have confused the concepts of neutral reportage with the obsolete doctrine of fair comment. While somewhat akin, they are certainly separate concepts.

This being so, a central contention made in the Answer to the Complaint (-- that is, the statements if not true were reasonably believed to be so), makes about as much sense as the specific inclusion in the Answer of the offenders' assurances that in any event, the broadcasts were not made maliciously. The same assailment applies with equal force to (a) the court's indefensible elimination of all facets of malice from

the case, and (b) the submission of these convoluted defense theories to the jury, enveloped as they were such that the instructions were really indecipherable and inapplicable.

CONCLUSION

All of the arguments made above make it at once clear that certiorari should be granted so the case can be reviewed and reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was mailed to the office of David C. Greer of the law firm Bieser, Greer & Landis, 400 Gem Plaza, Dayton, Ohio 45402, by certified mail, return receipt requested, this _____ day of August, 1986.

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1438

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: April 9, 1986

House of Wheat et al., Appellants,	:	Case No. 85-1885
v.	:	E N T R Y
Cliff Wright et al., Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

Addendum "A"

COSTS:

Motion Fee, $20.00, paid by James R. Willis.

FRANK D. CELEBREZZE
Chief Justice

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

HOUSE OF WHEAT :
and WAYNE WHEAT :

Plaintiffs-
Appellants :

vs. : CASE NO. 8614

CLIFF WRIGHT,
et al. :

Defendants-
Appellees :

.....

O P I N I O N

Rendered on the 10th day

of October, 1985

.....

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BROGAN, P.J.

This appeal emanates from a complaint filed by Wayne Wheat, a funeral home director and embalmer, in the Common Pleas Court of Montgomery County against defendants Miami Valley Broadcasting, Inc., WHIO-TV, and three of its employees, Cliff Wright, Richard Nordstrum and Jack Hurley. In the complaint Wheat claimed that the defendants, by virtue of certain telecasts in March of 1982 defamed him and the House of Wheat Inc., a funeral home which he operated and held controlling interest. He also contended that the defendants violated his right of privacy, and willfully, wantonly, and intentionally interferred [sic] with Wheat and his funeral home's business.

In its answer, the defendants admitted responsibility for the

telecasts, but asserted the defenses of truth, privilege of fair and impartial comment of official proceedings, and the privilege of reporting matters of public interest. After extensive discovery, the defendants moved for summary judgment on the issues of privilege, invasion of privacy, business interference, and punitive damages on the defamation claim.

The trial court granted summary judgment for the defendants on the plaintiffs' claims for invasion of privacy, intentional and malicious interference with business relationships, and punitive damages. The court overruled summary judgment on the defamation claim because "issues of fact existed as to whether the television broadcasts made by defendants were fair and impartial."

A jury trial was conducted on the remaining issue of whether the defendants negligently defamed the plaintiffs. The jury rendered a verdict for the defendants. The plaintiffs moved for a new trial and for judgment notwithstanding the verdict (J NOV) which was denied. Appellants have appealed and asserted numerous assignments of error which we will address after a discussion of the facts underlying this appeal.

On July 29, 1981, two school children discovered a plastic bag containing human viscera along the banks of the great Miami River near West Carrollton, Ohio. The boys took a sample of their discovery to the West Carrollton police, and the police went to the river location the next day and retrieved the bag the boys had found.

The bag was a dark, opaque, garbage type bag containing some loose organs and a double bagged grouping of organs. These bags were clear, orange tinted and labeled "Contaminated Material." Authorities conducted an additional search the next day and recovered another garbage-type bag containing additional bags which contained viscera. None of these bags carried identifiable writing.

The West Carrollton police contacted the County Coroner to determine whether the organs were of human origin and to investigate how the organs reached the West Carrollton location.

Coroner's investigators were able to trace the bag labeled "Contaminated Materials" to the St. Elizabeth Hospital. Pathological examination by

the Coroner revealed that the viscera in the labeled bag contained a unique combination of ideopathic diseases and was therefore traced to one Delma Shine who died at St. Elizabeth on July 13, 1981. The viscera of Mrs. Shine had undergone the embalming process. The parties to the lawsuit stipulated the viscera found on the river banks on July 29, 1981 are to a medical certainty those of Delma Shine.

The Coroner's investigation then determined that the House of Wheat Funeral Home had embalmed and buried Mrs. Shine. (Wheat's employee, Michael Nielson, picked up the viscera and corpse of Delma Shine from St. Elizabeth's). Chief Deputy Coroner K.P. Jones was contacted soon after the viscera was discovered by Ralph Blye, former President of the Ohio Funeral

Director's Association, who advised Jones that in 1975 the Association received a complaint from James Landry, a former Wheat apprentice. In the letter of complaint, Blye stated Landry reported he had been instructed by Wayne Wheat to place body parts in the river. Jones then contacted Landry and set up an interview in Dayton with Landry. Landry told Jones that Wayne Wheat had instructed him to dispose of body parts (viscera) in a dumpster in back of Wheat's funeral home.

On December 3, 1981, Jones wrote William Faulkner, investigator for the Ohio State Board of Embalmers and Funeral Directors. In his letter, Jones recapped the Coroner's investigation tracing the bag of viscera to Wheat's funeral home and mentioned that Landry, a former employee of Wheat could shed

light on Wheat's "ethics." The letter was subsequently read into the minutes of the Board's December 8, 1981 meeting. On March 2, 1982, Dr. James Davis, Montgomery County Coroner released a press statement that revealed to the public that the bag of human organs had been found on July 29, 1981. The release indicated that responsibility for the dumping had been traced to a "local funeral home." He indicated the investigation was continuing in order that charges may be brought against the person or persons responsible for this act." (Exhibit D).

On the afternoon of March 2, 1982, WHIO reporter Cliff Wright and camerman Richard Nordstrum visited Wheat at his funeral home. Wheat recognized them and consented to be interviewed according to Wright and Nordstrom. That evening on

the news broadcast by appellee WHIO-TV, Channel 7 (WHIO), owned and operated by appellee Miami Valley Broadcasting Corp. (Miami Valley), news reporter Cliff Wright (Wright), also an appellee told the viewing public about the viscera discoveries, the Coroner's press conference, and the Coroner's investigation. In the course of this report, Wright said the following:

> "Authorities came down and searched and during the two-day period found six bags full of human body parts belonging to five persons. The organs were found here but they were pitched into the river from some point further north toward Dayton. Investigative sources tell us they traced evidence to St. Elizabeth Medical Center where bodies and organs were picked up following autopsies. However, there is no evidence that St. Elizabeth is involved in any way in the callous disposition of the parts.

> Montgomery County Coroner James Davis said today his office knows who is responsible in at least one incident but needs more evidence before seeking prosecution. However, Davis said the evidence leads to a local funeral home. Our own sources say it is the House of Wheat located at the corner of North Williams and Second Streets."

Immediately following this, WHIO broadcast a video-taped interview with appellant Wayne Wheat (Wheat), principal shareholder and operator of appellant, the House of Wheat Funeral Home (House of Wheat), an Ohio Corporation, wherein Wheat denied any involvement in the improper disposal of organs. This interview was conducted by Wright and videotaped by appellee Richard Nordstrum (Nordstrum).

On March 4, 1982 Coroner Davis

wrote a letter to the Ohio State Board of Embalmers and Funeral Directors concerning the "appalling" factual circumstances which implicated Wayne Wheat and the House of Wheat in unethical practices of the viscera incident which had been under investigation since July of 1981 (App. 1160). Davis recapitulated statements of James Landry that "during the time of his employment by the House of Wheat, he was directed by Mr. Wheat to place plastic bags containing human viscera in the trash dumpster at the rear of the funeral home." The Coroner called upon the State Board to "revoke the license of Mr. Wheat on the grounds of unprofessionaql conduct." (App. 1160-1161).

That letter arrived at the State Board on or before March 8, 1982, when

WHIO Columbus correspondent Deborah Countiss obtained a copy upon request (R. 262). The March 8, 1982 broadcast on WHIO-TV reported the contents of the March 4th letter and referred to allegations that a former employee had reported past instances of disposing of human organs in a dumpster.

On April 1, 1982, the appellants filed their civil suit against the appellees. Subsequently, Mrs. Shine's body was exhumed and no body viscera was found. On May 5, 1982, appellants were indicted by the Montgomery County Grand Jury for the offense of Gross Misuse of a Corpse. Following trial, the jury acquitted Wayne Wheat but found the funeral home guilty. Subsequently, the trial court set aside the House of Wheat's conviction as inconsistent with Wayne Wheat's acquittal.

In their first two assignments of error, appellants contend the trial court erred in refusing to compel defendant Wright and deponent Debra Countiss to answer certain questions put to them upon written and oral examination.

Appellants contend in their first assignment that the appellees individually and collectively published falsehoods about appellants and that such falsehoods were published with actual malice. They contend that had appellees properly investigated the information they had received from the County Coroner and James Landry they would have discovered that the appellants did not utilize a "dumpster" at the funeral home location, and thus would have been on notice that Landry's allegations were probably false. In

order to determine the manner in which Cliff Wright and Debra Countiss checked their information before publication, appellant sought to discover their alleged news sources.

Wright contended in his deposition and at trial that sources with whom he had spoken before the broadcast verified to him that they had seen body parts in a dumpster at the rear of Wheat's funeral home in 1975. He also stated a source told him that Wheat and hi funeral home received dumpster service. He declined upon questioning at both the pretrial discovery and trial to disclose his source because of the newsman's privilege found in R.C. 2739.04. The trial court ruled that the source need not be revealed by Wright, but appellants' counsel could submit questions to appellees which did not

inextricably lead to divulgence of protected identities. The court declined to rephrase appellants' interrogatories and deposition questions:

> If counsel for plaintiff desires to pursue these areas of inquiry, counsel are urged to carefully draw the questions and give particular attention to making each question independent. Thereby, any objections would present clear cut issues for determination, although careful attention to the guidelines set forth in Geis, supra, may very well obviate controversy. (Decision and Entry, August 9, 1983).

Appellees contend that R.C. 2739.04 confers an absolute privilege upon the news media against forced disclosure of their news sources. In the alternative, appellants argue that the requested information need not be disclosed as it is irrelevant and therefore not

discoverable under Civ. R. 26(B) (1). Appellees argue that since they published accurately the contents of public documents or records, it is largely irrelevant whether the information contained therein was truthful.

R.C. 2939.04 provides:

> No person engaged in the work of, or connected with, or employed by any noncommercial educational or comercial radio broadcasting station, or any noncommercial educational or commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial or investigation before any court, grand jury, petit jury, or any officer thereof, before the

> presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer, or committee thereof....

In State v. Geis (1981), 2 Ohio App. 2d 258, the Franklin County Court of Appeals held that the legislative intent behind R.C. 2739.04 is to protect the relationship between an informant, who desires to give information to a radio or television news reporter but who fears publicity or the possible retribution arising from the discovery that he is the source of information that has been broadcasted, and a radio or television reporter. The court found such a relationship is to be fostered in order to protect the free flow of information from the informant to the reporter. It further found the

legislature intended such a purpose to be achieved by protecting only the identity of the informant.

The court found that the appellant Taft Broadcasting Company was required to comply with the subpoena duces tecum to produce certain videotapes never before published "only if it can be done without necessarily identifying the source of the information." Geis, supra, at 263.

The court went on the say, R.C. 2739.04 arms radio and television news reporters with an absolute privilege to protect the identity of their informants in any jucidial proceeding. Geis, supra, at 263.

Appellants contend that the appellees published false information in republishing Landry's charge that Wayne Wheat instructed him to dispose of

viscera in the dumpster in 1975. Appellants contend that Wright published such defamatory information without checking out whether the charge was truthful. They claim that Wright indeed had "phantom" sources, and since Wright is a defendant in the defamation action he must reveal his alleged sources. They assert it is virtually impossible to prove their actual malice and negligence claims without learning the names of Wrights's sources.

Appellants contend they demonstrated in their evidence that all waste management companies in the local Dayton area were checked by them and none stated they provided dumpster service for House of Wheat Funeral Home for the years in question. Appellant also presented evidence that the presence of buildings adjacent to the

funeral home in 1975 made it impossible for the House of Wheat to have received dumpster service. Appellants argue that the court erred by not balancing appellants need for the information regarding the sources against the interest of the appellees in keeping the identities of the sources secret. They contend the sources were unreliable or indeed did not exist, and that such evidence was highly relevant in their proving appellees were negligent or malicious in reporting the serious allegations about the funeral home and Wheat.

In the late 1950's superstar Judy Garland sued CBS for libel based on a gossip column comment Marie Torre reported and attributed to an anonymous Columbia Broadcasting executive. The identity of the source was crucial to

Judy Garland's case. Only if the source were a CBS executive would Ms. Garland have had an action againt the network and its deep pocket. After deposing several CBS executives and receiving from each a denial that he had made the alleged comments, Ms. Garland sought to depose Ms. Torre and discover from her who had made the remarks. Torre objected based on the reporter's privilege not to reveal her sources. The Court of Appeals for the Second Circuit affirmed the lower court's order for Torre to disclose her source, noting the identity of the source "went to the heart of the plaintiff's claim" since that would determine whether CBS could be held liable. Garland v. Torre, 259 F. 2d 545 (2d Cir), cert. denied 358 U.S. 910 (1958).

In libel suits, courts have refused

on First Amendment grounds to order disclosure of a defendant's confidential news sources except in the unusual circumstances in which (a) the plaintiff has demonstrated a substantial likelihood that disclosure will lead to persuasive evidence on the issue of liability, and (b) alternative sources have been exhausted.

In Cervantes v. Time, Inc. (8th Cir. 1972) cert. denied, 409 U.S. 1125, the Eighth Circuit held that a Life Magazine reporter did not have to reveal the confidential source of allegedly libelous statements about the organized crime connections of St. Louis Mayor Alfonse J. Cervantes. Cervantes was suing Life for libel. In Carey v. Hume (D.C. Cir. 1974) cert. dismissed 417 U.S. 938, the court ordered a libel defendant to disclose the identity of a

confidential news source. The case arose out of a Jack Anderson column reporting on the United Mine Workers and its general counsel, Edward Carey. The court emphasized that it was not establishing a general rule applicable to all libel defendants, but rather was limiting its decision to order disclosure to the extraordinary circumstances before it. The court ordered disclosure because the allegedly libelous statements was based entirely on confidential sources and the plaintiff had no way of proving either falsity or recklessness without knowledge of the identity of those sources. The court stressed its agreement with the rule applied by the Eighth Circuit in the Cervantes case, that a libel defendant may not be constitutionally required to disclose the identity of a confidential news

sources except when the information obtained from the source is the sole basis for the allegedly libelous statements.

Appellants contend the appellees libeled them in telling the public that the appellants improperly and criminally disposed of human body parts. The source of this information initially resulted from the Coroner's investigation. There is strong evidence in the record to support that Delma Shine's viscera was improperly handled by the House of Wheat. James Landry informed the Coroner and the appellees that Wayne Wheat had ordered him to dispose of viscera in 1975. The appellees did not rely solely on an unnamed "source" for their publication that the appellants were involved in this illegal activity.

In Branzburg v. Hayes (1972), 408

U.S. 665, the Supreme Court held the First Amendment does not release a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof.

Despite the rejection by the Branzburg majority, Justice Brennan was probably correct in his later assumption that under Branzburg "there is at least a limited First Amendment right to resist intrusion into newsgathering confidences." In Re Walter F. Rocke, Jr. (1980), 448 U.S. 1312, 1316. Justice

Powell, one of the majority of five, also filed a separate concurring opinion in which he opined that Branzburg "does not hold that newsman...are without constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709. Powell would determine the extent of the newsman's privilege by engaging in ad hoc balancing on a case-by-case basis. Justice Douglas was of the view that the First Amendment provides an absolute privilege. Justice Stewart, joined by Brennan and Marshall, would hold that "when a reporter is asked to appear before a grand jury and reveal confidences...the government must show (1) that there is probable cause to believe the newsman has information that is clearly relevant to a specific probable violation of law (2)

demonstrate that the information cannot be obtained by alternate means less destructive of First Amendment rights, and (3) demonstrate a compelling and overruling interest in the information. 408 U.S. at 743. Thus, the four Branzburg dissenters, plus Justice Powell as a swing vote, leave the newsman's privilege open for application in future cases, but with no clear indication as to the circumstances in which it may be invoked.

In any event, post-Branzburg lower courts have assumed that there is a First Amendment based newsman's privilege, leading one lower court to state the existence of a First Amendment privilege "is no longer in doubt." Silkwood v. Kerr-McGee Corp. (10th Cir. 1977) 563 F. 2d 433.

Justice White noted in Branzburg,

supra, Congress was free to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standard and rules accordingly. He also noted at page 709 of the opinion:

> There is also merit in leaving state legislature free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to law enforcement officials and press in their own area. It goes without saying that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In Maressa v. New Jersey Monthly (1982), 445 A. 2d 376, the Supreme Court of New Jersey held that its state Shield Law affords newspersons an absolute

privilege not to disclose confidential sources and editorial processes, absent any conflicting constitutional right. The court held that the newsperson's privilege in a civil action for libel is absolute.

The court in Maressa noted, "the existence of a judicial remedy for injury to reputation is entirely a matter of state law. A plaintiff's interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damage actions." Paul v. Davis, 424 U.S. 693, 712 (1976). Id. at 384.

The Court went on to say:

> Following Paul v. Davis, federal courts have noted that "the State has created the (defamation) cause of action and hence...it can limit,

modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation." Mazzella v. Philadelphia Newspapers, 479 F. Supp. 523, 528 (E.D.N.Y. 1979). In Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (1980), the Third Circuit interpreted the Pennsylvania Shield Law, 42 Pa. Const.Stat.Ann Sec. 5942(a) (Supp. 1979), which is similar to the New Jersey Shield Law, as granting defendants the right not to disclose the unused portions of film taken for an allegedly defamatory television report. The court found that the privilege did not deny due process because there was no constitutonal interest in defamation:

The Constitution has never been construed as requiring the states to provide persons or organizations who have been defamed with a remedy for their injuries. It follows that, to the extent a state chooses to authorize a cause of action for defamation, it may also limit the plaintiff's ability to prove his claim in order

to promote other social purposes. (Id. at 279 n. 74).

Likewise, this Court has held that although defamation actions serve an important public policy, "in certain situations there is a paramount public interest that persons be permitted to speak or write freely without being restrained by the possibility of an ensuing defamation action." Rainier's Dairies, 19 N.J. at 557-58, 117 A.2d 889. In many contexts our courts have refused to recognize a cause of action for defamatory statements, including statements made during judicial proceedings, see Rogers v. Thompson, 89 N.J.L. 639, 99 A. 389 (E. & A. 1916), before administrative agencies, see Rainier's Dairies, supra, and in complaints filed with this Courts Committee on Professional Ethics, see Friedland v. Podhoretz, 174 N.J.Super. 73, 415 A. 2d 381 (Law Div. 1980). These limitations on the tort of defamation raise no constitutional issue because the State's interest in fashioning its

> own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational. (Martinez v. California, 444 U.S. 277, 282, 100 S. Ct. 553, 557, 62 L.Ed.2d 481, 487 (1980))
>
> The Shield Law protection of confidential news sources clearly does not constitute arbitrary or irrational state action.

Judge Pashman, writing for the Court in Maressa was not unmindful of the difficult choice made by the legislature of the State of New Jersey and its consequent effect on libel plaintiffs. He said:

> The remedy of libel judgments has a role in our democracy; it compensates individuals for their injured reputations. But only free expression can preserve a democratic nation. Money

awards are a medium of financial recompense. But free speech is the national currency. Our legislators have advanced this country's goals by protecting the press even at the cost of reducing their own protection against its attack. Their action would have stirred the former president of this country who said that "were it left to me to decide whether we should have government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." The Life and Selected Writings of Thomas Jeffrson 411-12 (A. Koch & w. Peden, eds., 1944).

Every libel law and every law affecting libel actions, including the New Jersey Shield Law, must balance important competing interests. We in no way seek to minimize the individual's interest in protection of his or her good name, which "reflects no more than our basic concept of the essential dignity and worth of every human being." Rosenblatt v. Baer, 383 U.S. 75, 92, 86

> S.Ct. 669, 679, 15 L.Ed. 2d 597, 609 (1966). (Stewart, J., concurring). But the legislature has weighed the competing interests in a free press and the individual interest in reputation. It has chosen to give greater protection to freedom of speech, and our duty is to enforce that choice.

Appellants contend Wright refused to reveal when he had contact with a source, whether he received documents from the sources, and what, if any information he received from the source. (Appellant's brief, p. 15). Appellants fail to specify with particularity those questions propounded to witness Wright, which they believe should have been answered as relevant and not privileged. Our examination of the record reveals the trial court properly sustained questions whose answers may have necessarily made the identity of the

source more probable. Wright did reveal the content of what his sources told him.

Appellants contend Debra Countiss a news reporter for WHIO, should have answered her source of information (about Landry's letter to the Board) and how she came to know this information. Such inquiry and answer could readily identify her source. See Geis, supra.

We believe the newsman's privilege granted by R.C. 2739.04 to be absolute in civil litigation. A trial judge must be accorded wide discretion in ruling upon objections to those questions of newspersons answers to which may compromise their news sources. We see no abuse of discretion in the trial court's rulings. The first and second assignments of error are overruled.

In its third assignment of error,

appellant contend the trial court erred in granting summary judgment as to appellants privacy and false light claims and in ruling that constitutional malice must be proven by private figure plaintiffs.

In a Decision and Entry dated September 14, 1983, the motion judge granted appellees' motion for summary judgment as to appellants' second cause of action. This cause of action consisted of claims that appellees, Wright and Nordstrum in particular, invaded appellants' privacy, recorded, taped and broadcast an interview with Wheat without his or House of Wheat's consent, and created a false image of appellants and caused them to be viewed in a false light by the general public. We will address separately these claims of invasion of privacy or intrusion and

"false light."

During the late afternoon of March 2, 1982, news reporter Wright and photographer Nordstrum went to the House of Wheat. They were admitted to a foyer by an employee of the House of Wheat who then went to inform Wheat that two newsmen wished to speak with him. Wheat came out, greeted Wright and Nordstrum and invited them back to his office. Once there he spoke with them and answered their questions. Portions of this interview, wherein Wheat denied any involvement both by himself and the House of Wheat, were broadcast on the evening news of March 2, 1982, plus on several subsequent news broadcasts. During this meeting in Wheat's office, Nordstrum was seated in a chair across a desk from Wheat. His camera was in his lap, and his recorder was on the floor.

Wright was standing next to him. Wheat was seated at his desk. After conducting this interview, Wright and Nordstrum left. These are the undisputed facts. In dispute are facts concerning whether Wheat knew he was being taped and whether he consented to the taped interview.

Wheat maintains that upon entering his office Wright informed him that he and the House of Wheat were the subjects of the Coroner's investigation, and asked him if he wanted to make a statement for television. Wheat said that he did not wish to appear on television but that he would agree to speak to them "off the record." Wright reacted by putting his microphone down, and Nordstrum sat in the chair. He therefore believed that he was not being recorded.

According to Wright and Nordstrum, this did not happen. Wright maintains he did not put the microphone away. Nordstrum testified that he sat in the chair with the camera in his lap because he is able to get a better, steadier shot than he can standing with it on his shoulder. Both men testified that they believed Wheat knew he was being taped. Further, testimony of Wright, Nordstrum, and appellee Jack Hurley (Hurley), who was WHIO's news director at all relevant times, as well as interrogatory responses of Wright and Miami Valley indicate that the policy of Miami Valley/WHIO is that whenever a person speaks to WHIO reporters, knowing they are WHIO reporters, consent to be taped, broadcast and/or quoted is implied absent a statement to the contrary by the person. Wright and Nordstrum

testified that Wheat did not say he did not wish to be taped or broadcasted. There is no dispute as to Wheat's knowledge who Wright and Nordstrum were. He testified that he recognized Wright from seeing him on TV and he saw the WHIO Channel 7 markings on Nordstrum's camera. Wheat, however, maintains that the "surreptitious" taping of this conversation and its subsequent broadcasts constituted invasions of his privacy.

In ruling on appellees' motion for summary judgment, the motion judge acknowledge Ohio's recognition of a right of privacy. "The right of privacy is the right of a person to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not

necessarily concerned." Housh v. Peth (1956), 165 Ohio St. 35, paragraph one of the syllabus. The second paragraph of the same case's syllabus states: "An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." (Emphasis ours).

The motion judge, finding that Ohio's common law in this area was not extensive, turned to Michigan law. The court stated that "(i)n Michigan, the intrusion tort has three elements: (1) existance of private subject matter; (2)

a right possessed by plaintiff to keep it private; and (3) information about the subject matter being obtained in a method objectionable to the reasonable man." (citation omitted). The court after stating some of the facts, applied this law and came to the following conclusions:

> Although the record does show that plaintiff maintains he did not think he was being filmed and did not give defendants permission to film or broadcast, the Court cannot find this issue of fact material or sufficient to sustain the cause of action.
>
> First, even if plaintiff's denial of guilt can be classified as private subject matter, such status was lost when he spoke openly to the reporters after inviting them into his office, and when his attorney held a public press conference on March 16, 1982, and made the same denial while questioning the motives and conclusions of the

> coroner's investigation.
>
> Second, the Court cannot say as a matter of law that either the conduct of the defendants or the circumstances surrounding the taping approach a colorable showing of unreasonableness. There was no trespass; the camera was in full view. Plaintiff voluntarily responded to questions and did not ask defendants to leave. Additionally, the Court cannot say that he had a reasonable expectation of privacy after he consented to their continued presence. (Citation omitted).

Thus, finding that there was no material issues of fact and that appellees were entitled to judgment as a matter of law, the court granted appellees summary judgment on this issue.

Although we agree with appellants that any subsequent action by Wheat's attorney cannot be considered in determining whether Wheat waived his

privacy interests on March 2, we otherwise agree with the Court's ruling. Additionally, applying the Michigan standard, we believe that the public interest surrounding the discovery of viscera on the river banks overcomes any "right possessed by plaintiff to keep (his denial) private." Further, we have been unable to find any cases where the surreptitious taping and subsequent broadcast of a person under these circumstances has been held to be actionable. This case presents a very different issue than that presented in Zacchini v. Scripps-Howard Broadcasting Co. (1976), 47 Ohio St. 2d 224, reversed on other grounds (1977), 433 U.s. 562. Zaccchini was a "human cannonball" a circus or carnival performer who would have himself shot out of a cannon before paying audiences. His entire performance

took 15 seconds. Scripps-Howard owned a television station which showed his entire act on its newscasts. This was held to be actionable as it was a commercialization or an appropriation of his legally protected economic interest in his performance. The court held it was the showing of his act without any remuneration to him which was actionable. This case is also very different from that where the likeness of a famous person is appropriated for someone else's economic or commercial benefit. Wheat is not a famous person with any property interest in his likeness for an economic benefit. We find that Wheat does not have any property interest in his electro-magnetically reproduced image. The same holds true for the House of Wheat.

In Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, the Supreme Court of Ohio stated:

> This court has recognized a cause of action for invasion of privacy in Housh v. Peth (1956), 105 Ohio St. 35. However, this court has not recognized a cause of action for invasion of privacy under a "false light" theory of recovery. Under the facts of the instant case, we find no rationale which compels us to adopt the "false light" theory of recovery in Ohio at this time.

Were the Supreme Court to adopt a "false light" theory of recovery, we are convinced that actual malice must be shown by the plaintiff to support the claim. Restatement of Torts 2d Torts (1977), 394, section 652E reads:

> Publicity placing persons in false light One who gives publicity to a matter concerning another that places the other before the public in a

> false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was places would be highly offfensive to a reasonable person, and
>
> (b) the action had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. (Emphasis added).

Accord: Strutner v. Dispatch Printing Co. (1982), 2 Ohio App. 3d 377.

The third assignment is accordingly overruled.

In appellants fourth assignment of error, they contend the trial court erred in ruling in the summary judgment entry that an issue under R.C. 2317.04 existed as to whether the broadcasts here involved could be regarded as fair

and impartial reportage.

Initially we note that appellants did not move for summary judgment, appellees did. Appellees moved for a summary judgment on the issue of whether they had published or reported false and unprivileged information concerning the appellants. Appellees contended in their motion that they were entitled to summary judgment in that the broadcasts were the subject of this lawsuit were "privileged" communications under R.C. 2317.04. They offered supporting affidavits and other exhibits in support of their motion. The appellants filed a motion contra the motion for summary judgment and supporting evidentiary material. The trial court overruled the motion for summary judgment finding there to be material facts in issue as to whether the broadcasts were a "fair

and impartial" reportage of proceedings before state boards and therefore privileged. It was appellees who failed to prevail upon their motion for summary judgment.

Appellants are not entitled to claim error in the denial of summary judgment unless they moved for summary judgment to be entered in their behalf, and presented supporting materials pursuant to Civ. R. 56. The assignment has no merit. Marshall v. Aaron (1984), 15 Ohio St. 3d 48.

Appellants' fifth assignment of error is also aimed at a grant of summary judgment.

In their Amended Complaint, appellants state that appellees' acts statements were done either negligently or with actual malice. "Actual malice" as used by the parties and in this

opinion has been defined as knowledge of the falsity or reckless disregard as to the falsity of the statements published. See New York Times v. Sullivan (1964), 376 U.S. 254, 280. Under Ohio law and the facts of this case, a suit brought by private figure plaintiffs against news media defendants alleging defamation and invasion of privacy, proof of actual malice would serve two functions: 1) vitiate any qualified privileges to defame plaintiffs which defendants might establish, and 2) entitle plaintiffs to punitive damages should defendants be found liable.

In the Entry and Decision of September 12, 1983, the motion judge said the following:

> The Ohio cases reaching the issue of the standard of fault in private libel suits have held that plaintiffs must plead and prove at least that the

media defendant published defamatory falsehoods negligently. See (Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co. (1974), 43 Ohio App. 2d 105, 110 certiorari denied (1975) 423 U.S. 883). As such, currently under Ohio law the elements of a valid libel claim are that (1) the statement(s) must be false, (2) the statement(s) must be capable of defamatory meaning toward the plaintiff, and (3) that defendant must be proven guilty of some degree of fault, (citing Hersch v. E.W. Scripps Co. (1981), 3 Ohio App. 3d 367, 374). There is no dispute over whether the broadcasts were published.

Having examined the various pleadings, affidavits, and discovery materials, the Court finds that the plaintiffs have failed to adduce probative evidence which establishes with "convincing clarity" that the defendants acted with actual malice, that is with knowledge of falsity or reckless disregard for the truth or falsity of the broadcasts. There is no evidence which establishes that the

defendants believed the broadcasts were false or entertained doubts as to the truth of the broadcasts. See, e.g. St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968). As such, the Court SUSTAINS the defendants' motion as to liability for punitive damages under the plaintiffs' defamation claim. (citing Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, at 347-349).

However, reaching the issues of whether the defendants broadcasts contained inaccurate information capable of defamatory meaning or inferences of defamatory meaning, whether the broadcasts, if false and defamatory, were made negligently, or with express malice, and whether the plaintiffs suffered actual injury, the Court finds that the record does disclose genuine issues of material fact. Accordingly, the defendants' motion for summary judgment as to these issues is overruled.

In addition to the neglience standard

for recovery by a private plaintiff stated in Maloney, we note that the Ohio Supreme Court has ruled that "In cases involving defamation of private persons, where a prima facie showing of defamation is made by the plaintiff, the question which a jury must determine by a preponderance of evidence is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication." Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co. (1984), 9 Ohio St. 3d 22, certiorari denied (1984), 104 S. Ct. 2679.

As stated earlier, Civ. R. 56(C) contains the standard to be applied in the grant or denial of summary judgment. It states in relevant part:

> "...Summary judgment shall be rendered forthwith if the (evidence) show(s) that there is no genuine

> issue as to any material fact and that the moving party is entitled to judgment as a matter of law.... A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and the conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor...."

Thus the issue presented is "Whether there was a genuine issue as to any material fact from which a jury could find actual malice." In support of their argument that there was, appellants argue that the mental states of appellees are critical to the issue of actual malice; and since issues relating to mental state can only be proven by inference, and not by direct evidence,

they are "peculiarly decisions for the jury and ...rarely susceptible to resolution on summary judgment." In support, they cite Poller v. Columbia Broadcasting System (1962), 368 U.S. 464, and White Motor Co. v. United States (1963), 372 U.s. 253, both of which are federal anti-trust actions, and Hutchinson v. Proxmire (1979), 443 U.S. 111, and Wolston v. Proxmire (1979), 443 U.S. 111, and Wolston v. Readers Digest Association (1979), 443 U.S. 157, both of which were defamation actions. In Poller the court said at 473: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. (Footnote omitted). It

is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which for so long has been the hallmark of 'even handed justice.'" In White Motor the court stated at 259: "Summary judgments have a place in the antitrust field...though as we warned in (Poller), they are not appropriate 'where motive and intent play leading roles.'".

In Hutchinson, the court in discussing whether the grant of summary judgment is the rule rather than the exception on issues of actual malice, the court said in a footnote "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called

'rule.' The proof of 'actual malice' calls a defendant's state of minnd into question, (citing New York Times v. Sullivan, supra,) and does not readily lend itself to summary disposition. See 10C Wright & A. Miller, Federal Practice and Procedure Section 2730, pp. 590-592 (1973)...." Hutchinson, supra, 443 U.S. at 120 n. 9. In Wolston, the court simply refers to this footnote. Wolston, supra, 443 U.S. at 161 n. 3. 10A Wright, Miller & Hane, Federal Practice and Procedure (2 Ed. 1983) 236-265 Section 2730, contains an excellent discussion of the role of summary judgment in actions involving states of mind. In addition to the portion cited by the court in the footnote in Hutchinson, which is now located at pp. 240-242, the text goes on to say "Actions that involve questions of malice often are

disfavored torts; that is especially true of those that threaten the free exercise of important rights such as speech and press. Viewed from this perspective, summary adjudication may be thought of as a useful procedural tool and an effective screeningt device for avoiding the unnecessary harrassment of defendannt. (Footnote annotation omitted.) As Judge Wright observed in Washington Post Co. v. Keogh ((C.A.D.C., 1966), 365 F. 2d 965, certiorari denied (1967), 385 U.S. 1011), a libel action against a newspaper: 'that state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness, which is ordinarily inferred from objective facts. Summary judgment serves important functions which would be left undone if courts too

rstrictively viewed their power. ...In the First Amendment area, summary procedures are even more essential.' (Keogh, supra, 365 F. 2d at 967-968). Therefore, unless plaintiff can produce some affirmative evidence to indicate that malice existed, summary judgment may well be granted in these cases." Id. at 242-245.

Several courts have addressed the issue of whether the grant of summary judgment on issues of actual malice should be the rule or the exception. In Yiamouyiannis v. Consumers Union (C.A. 2, 1980), 619 F. 2d 932, certiorari denied (1980), 449 U.S. 839, the court said "neither grant nor denial of a motion for summary judgment is to be preferred." Id. at 940. The Court goes on to say that "The rule of Sullivan, ...requires that proof of malice must be

with 'convincing clarity'. ...In a case where the defendant has moved for summary judgment on the issue of actual malice and the plaintiff claims that there remain material factual disputes, the court decides the materiality of the disputed facts by accepting the plaintiff's version and applying the actual malice standard. This standard requires a clear and convincing showing, which may be made by circumstantial evidence, of defendant's actual state of mind - either subjective awareness of probable falsity or actual intent to publish falsely. Therefore, a judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits 'a reasonable jury could find malice with convincing clarity.'" Id. (citation omitted.) (Emphasis in the

original). Other courts have adopted this standard as well. See, e.g., Schultz v. Newsweek, Inc. (C.A. 1982), 668 F. 2d 911, 917.

Appellants argue that the following material facts are still in issue: "(a) the manifest presence of defamatory falsehoods in the assailed broadcasts, (b) the clear dispute as to whether the taped interview of Wheat was done with his permission, (c) the clear indications that the appellees 'sources were totally unreliable or did not exist, and, ...(d) the appellees' adamant position that they gave no regard whatsoever to whether the content of the broadcasts were true or not...." The presence of falsehoods which may be defamatory may indeed be probative proof of appellees' knowledge of their falsity or reckless disregard of it. Looking at

the record, however, we cannot say that the motion judge erred in finding that appellants had failed to prove by convincing clarity appellees' knowledge that their statements were false, or a reckless disregard of any falsity. We wish to note at this juncture that "reckless disregard" has been held to mean that the defendant "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson (1968), 390 U.S. 727, 73. The same holds true with regard to statement (c). While appellants made the assertions that appellees' sources are unreliable or non-existent, they did not offer proof of this which shows actual malice by convincing clarity. In Herbert v. Lando (1979), 441 U.S. 153, 157-158, the court says that "subjective awareness of probable falsity." citing

Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, 335 n. 6, can be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Citing St. Amant, supra 390 U.S. at 732. We are sympathetic to the fact that appellants' inability to do so may be due to the rulings of the motion judge and trial judge to not require appellees and Countiss disclose the identities of their sources, but as stated in our discussion of the first two assignments of error, R.C. 2739.04 confers upon appelles an absolute privilege not to disclose that information. We further believe that the contacts made by appellants of various waste disposal companies on the narrow issue of whether they ever serviced a dumpster for either appellant from which they received

negative answers do not show actual malice with convincing clarity. As to statement (b), we do not believe the resolution of the question of whether or not Wheat consented to the taped interview is at all material to the issue of whether or not false statements were made by appellees with knowledge of their falsity or reckless disregard of their falsity. The resolution of this issue may be, relevant to the issue of express malice - that is, ill will, hatred, or spite on the part of appellees toward appellants - and in fact testimony regarding this incident was heard by the jury. Finally, we believe that the wording of (d) greatly misstates what occurred in this case. Appellees never testified that they did not care whether or not contents of their broadcasts were true. What they

said was they did not care whether or not it was indeed true that Wheat instructed Landry to place the viscera in the dumpster. The only thing they reported to the public was that the coroner - an elected public official - had reported to the State Board - the official body charged with regulating funeral homes, funeral directors and embalmers - that his investigators had been told that by Landry. All they sought to verify by contacting Landry directly was that he had said this, not that it indeed had happened. Nothing, he said was repeated to the public, save what was attributed to Dr. Davis' letter, nor did appellees state that the incident indeed occurred. Had this happened the way appellants' wording indicates it did, this could be deemed proof by convincing clarity of actual

malice. In light of the actual facts, it is not. "(M)ere proof of failure to investigate, without more, cannot be established reckless disregard for the truth. Rather, the publisher must act with a '"high degree of awareness of...probable falsity."'" Gertz, supra, 418 U.S. at 332, citing St. Amant. We do not find any reason in the record to believe appellees entertained serious doubts as to whether or not Landry had made the statements to the Coroner's investigator as the coroner reported he did. We are therefore of the opinion that there are no material issues of fact, and since appellants have not been able to show by convincing clarity proof of actual malice from these facts, appellees are entitled to judgment on this issue as a matter of law.

For the foregoing reasons, we hold

that the Court did not err in granting summary judgment in appellees' favor on the issue of actual malice. The fifth assignment of error is overruled.

The sixth assignment assigns as error the court's partial grant of summary judgment as to appellants' third cause of action.

In their Amended Compalint, appellants allege the following:

> 24. Since March 2, 1982, the defendants during the course of the employments and business had willfully, wantonly, and intentionally engaged in a course of conduct for the express purpose and intention of preventing plaintiffs from conducting their business and profession. Said defendants acts have interfered with and substantially prevented plaintiffs from conducting their professional affairs.
>
> 25. This course of conduct has included but is not limited to:

(a) subjecting plaintiffs to unwarranted and defamatory publicity

(b) interfering with plaintiffs relationship with its employees and co-workers both past and present.

(c) and causing defamatory broadcasts to be aired.

In the Decision and Entry of September 12, 1983, the motion judge ruled on appellees' motion for summary judgment on this claim. He said:

"The plaintiffs' third claim for relief ostensibly pleads intentional interference with the plaintiffs' business and business relations with its employees. However, the plaintiffs principally rely on allegations of defamatory conduct to support the claim of interference and to that extent the plaintiffs fail to state a claim for

intentional interference. To the extent the third claim for relief parallels their first claim sounding in defamation, it will be treated as such. The only other evidence adduced by the plaintiffs indicates that when this lawsuit was filed, the defendants WHIO-TV requested of Smith and Crawford, employed at both WHIO-TV and the House of Wheat, that they choose between employment with either the defendant, WHIO-TV, or the plaintiff. The record does not reveal an interference with the plaintiffs' business relation with Smith and Crawford. Rather, the defendants were merely protecting their own legally protected interest in light of the parties' adverse relationship once the suite (sic) was filed. See Pearse v. McDonalds (1975), 47 Ohio App. 2d 20, 23. Accordingly, the defendants' motion

for summary judgment as relates to the third claim for relief is SUSTAINED."

Initially, we wish to emphasize that whereas we agree with the Court's analysis of appellees' handling of the joint employees Smith and Crawford, as pointed out by the Court, those events occurred after the complaints in this case were filed and therefore are not included within the alleged activities that form the basis of this claim.

Instead, appellants point out that although the county prosecutor had stated at several points he felt the evidence was insufficient to bring criminal charges and a conviction, appellees called for the revocation of appellants' licenses. Again, we find this to be a misstatement of the facts as shown in the record. We find that the only times revocation of licenses was

mentioned in the broadcasts were when appellees, quoting Dr. Davis' March 4th letter to the State Board, reported that the Coroner said at the close of that letter "I hope this information is sufficient for the board to revoke the license of Mr. Wheat on the grounds of unprofessional conduct"; and in reports about the various functions and powers of the State Board when they said one of its powers is the ability to revoke licenses. In those reports they also stated that the State Board had only done so four times in twenty years. They also mentioned that conviction of a crime is not a prerequisite to revocation. We are not of the opinion that by giving these reports, appellees were calling for the revocation of appellants' licenses. Rather they were merely informing the public that the

coroner had called for the licenses revocation, and now, and under what circumstances, a license could be revoked.

Appellants further argue that all through their broadcasts, appellees "willfully and deliberately dissuaded consumers from doing business with the plaintiffs by knowingly disseminating false information." It has been stated that "one who without a privilege to do so induces or purposely causes a third party not to enter into or continue a business relationship with another or perform a contract with another is liable to the other for the harm causes thereby." Juhasz v. Quick Shops, Inc. (1977), 55 Ohio App. 2d 51. First, we find the record to be devoid of any evidence that appellees purposely caused anyone to not initiate or discontinue

business with appellants. Second, as we discussed in our fifth assignment of error, we find no evidence that appellees knowingly disseminated false information. Finally, although Wheat testified that his business declined following the broadcasts, and that one woman who had previously entered a contract with appellants to handle her funeral when she dies cancelled those plans, he could show no more than it was his feeling or opinion that those events were due to the broadcasts. No testimony was elicited from any other persons, save Ralph Blye who only stated that this sort of publicity "can't help" business. Further, Wheat testified at his deposition his business often runs in cycles where at times he is extremely busy and at other times weeks may pass without any business. Additionally he

stated that on other occasions, parties who had arranged with him to perform funerals changed their minds and took their business elsewhere. We therefore hold that the motion judge did not err in finding that there was no evidence to support this claim. There being no material issues of fact in dispute, and appellees being entitled to judgment as a matter of law, the court properly granted summary judgment in favor of appellees.

The sixth assignment of error is not meritorious.

Appellant next argues that "the trial court abused its discretion and/or erred by participating in ex parte communications with the appellees." In essence, this assignment refers to three separate events. We will discuss these in order.

The first relates to an order filed by the court on September 14, 1983, just five days before the trial began. In it, the court stated as follows:

> Upon application of the defendants and for good cause shown it is hereby ORDERED that the report prepared on or about June 22, 1981 by Mr. Kevin Ganger and others of the Ohio State Industrial Commission concerning the investigation into Wayne Wheat and/or The House of Wheat be made available to the defendants and their agents...for inspection and copying.
>
> Copies of the within Order shall be mailed by ordinary mail this date to counsel for plaintiffs.

Appellants state that if it was in written form, they received a copy of appellees' "application" which under Civ. R. 7(B) should be made in writing unless made at a hearing or trial. If made orally, as it apparently was,

appellants had no notice of any such "hearing." In fact, appellants state in their brief that they knew nothing of this matter until they saw it in the Court's records as they were preparing this appeal. Appellants further state that they have no idea what the "good cause shown" was. Additionally, they state that they did not receive a copy of the order as provided in the last sentence. They also state that the report should have been made available to all parties and not just the appellees. Finally they state that various irrelevant evidence allowed at trial can be traced to the granting of this order. In sum, they argue that this entire procedure was unethical, illegal and unconstitutional. We disagree.

At trial, the court allowed into evidence testimony and evidence which

was limited by the court to the issue of Wheat's credibility. In short this testimony related to the death of a man whose funeral was handled by appellants. The evidence showed that the man had been receiving workers' compensation. Appellants accepted as partial payment for their services a workers' compensation check dated the same day as the man's death. This check was endorsed on the back by the man's name in handwriting. Evidence indicated that the man had been unable to sign his name, and instead endorsed his checks with an "X" which would be witnessed by two persons. It therefore appears that this signature was a forgery, but the record is not clear as to who had done it. Testimony does show that Wheat prepared an affidavit for the man's daughter, Barbara Andrews, stating that she had

personally observed her father sign the check. Ms. Andrews testified that Wheat himself then signed her name to the affidavit, and then signed it himself as a notary public stating that it was Ms. Andrews who had appeared before him and signed it. Wheat himself largely admitted to this, but said he did so with Andrews' permission. Wheat also testified about speaking with the State Industrial Commission's investigator. The only objections which appear on the record are under Evid. R. 402 and Evid. R. 403 saying that this material was irrelevant, or if relevant, its prejudice outweighs its probative value. Wheat himself identified both the affidavit and the check. Appellants fail to show any prejudice.

It has been held that in matters dealing with discovery, the court's

powers are discertionary. See, State, ex rel. Daggett v. Gessamann (1973), 34 Ohio St. 2d 55, paragraph one of the syllabus. Further, under Civ. R. 26(B)(1), the appellees were entitled to discovery. Further, even assuming any error or abuse of discretion in granting an oral motion made out of appellants' presence, we do not see how they were prejudiced. Although they did not have the opportunity to respond, they fail to state what their response would have been or how the outcome would have been in any way different. As stated above, they did not appear to be surprised. Their only objections were on the grounds of relevance. Thus we hold that any error was harmless.

The next alleged instance of an ex parte contact arose when one of appellees counsel, unaware that

appellants had obtained a protective order forbidding the dissemination of any information without prior leave of court, showed the deposition of Coroner's investigator K.P. Jones to Ralph Blye and Clarence Bowman, Jr., prior to their depositions so that they might see what Mr. Jones had said about them. Realizing that this might constitute a violation of the court's orders, the attorney immediately contacted the judge and informed him of the incident. The judge in essence stated that he did not consider that a problem. The next day, counsel informed appellants' attorneys of these events and added that the judge had stated they could contact him if they had any problem. The record does not indicate that they did so.

We are not pursuaded that

appellants were in any way prejudiced or harmed by this. Mr. Blye testified that he did not get to read Jones' deposition. Further, his account of certain events differed greatly from Jones' version. Thus there is no evidence of collusion. Mr. Bowman denied those things which Jones had said about him. We do not see how his testimony would have been any different. Further, it does not appear in the record that appellants attempted to exclude these witnesses from testifying nor did they seek any remedial or limiting instructions.

The final incident involves appellees' use of exhibits from the previous criminal trial. Appellants state that appellees "through some unrecorded method obtained and had unrestricted access to the exhibits from

(the) prior criminal trial." This, they argue, could only have been done through ex parte contacts. The record indicates that the judge who presided over the civil trial also presided over the criminal trial wherein Wheat and the House of Wheat were prosecuted. On the record he states that the present court reporter was also court reporter in that case, that the court reporter is the custodian of all the exhibits, and that both parties could have access to whatever exhibit from that trial they might desire. Finally we note that no objection was made to either the use of the exhibit nor to its admission into evidence. Even assuming error, we again fail to see how appellants were harmed or prejudiced. Any error would be harmless.

Accordingly, appellants' seventh

assignment of error is not well taken.

Appellants have divided their eighth assignment of error into several subparts. We shall deal with each of these in order. Each argues that the trial judge erred in various rulings regarding the examination of witnesses at trial, especially with regard to the use of prior testimony.

A.

Appellants argue that "Under (Evidence) Rule 607 a party's own witness may be impeached by prior inconsistent statements, and otherwise, to the same extent as a witness called by the adversary." Appellants argue that the trial court erred in not allowing them to show that various witnesses had made prior inconsistent statements. The purpose for doing so is to attack their credibility or, in other words, to

impeach their testimony. They also argue the Court erred in restricting the format of the prior statement's use. The witnesses to whom appellants refer are Dr. Davis, coroner's investigators K.P. Jones and Eugene Brown, Ralph Blye, Wright and Nordstrum. Wright and Nordstrum, being adverse parties, were called during appellant's case in chief upon cross examination. Except for Blye, the rest of the witnesses named above were called by appellants during their case in chief upon direct examination. They are deemed witnesses called by appellants. Appellants argue that Evid. R. 607 rejected the "voucher rule" which in essence stated that a party calling a witness "vouched" for the witness' credibility, and could never impeach the witness or attack his credibility. With this we agree. As stated above,

appellants further argue that Evid. R. 607 allows them to impeach their own witness to the same extent as they may impeach a witness called by the adversary. We believe this argument fails due to the clear wording of Evid. R. 607. In full, it states as follows: "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Rules 801(D)(1)(A), 801(D)(2), or 803." (Emphasis ours). Thus we find that surprise and affirmative damage are prerequisites to the use by a party of prior inconsistent statements to impeach a witness called

by him. Our review of the record does not reveal any instances where these prerequisites exist. Additionally we find that many of the statements were not inconsistent. We also wish to note that although several of these may be deemed not to be hearsay under Evid. R. 801(D)(1)(a), appellants did not seek to admit them as such, thus the last sentence of Evid. R. 607 is of no avail to them. As to appellant's attempts to impeach Blye, Wright and Nordstrom by use of their respective depositions, we believe the court was correct in those instances where it restricted the depositions' use in finding that the testimony at trial was not inconsistent with the testimony contained in the deposition. We do not believe that the court's rulings had the effect of excluding any facts or any relevant

testimony as to either the substance of the case nor the witnesses' credibility. Accordingly, as to these instances, we hold the trial court did not err.

B.

Appellants' argument states "Under (Evidence) Rule 613(a) there is no requirement that a witness must be shown a prior statement made by him before examining such witness on the basis thereof." Evid. R. 613(a) states: "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel." We believe that this must be read in conjunction with Evid. R. 613(b), which provides: "Extrinsic evidence of a prior inconsistent

statement by a witness is not admissible unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 8019(D) (2)." Appellants contend that the court erred by requiring them to lay a foundation by asking the witness whether at a prior date a certain question had been put to him, (then repeating the question) and whether he had answered it in the following manner (then repeating the answer). The argument in essence is that this gave the witness advance warning to fabricate an answer or explanation which destroys any inconsistency where he might otherwise have been trapped,

thereby destroying effective cross examination. Counsel states that Evid. R. 613(a) is aimed at preventing these warnings. We disagree. We find the staff note to Evid. R. 613 to be most informative. It states as follows:

> Rule 613(A) Examining Witness Concerning Prior Statement
> The rule is identical to Federal Evidence Rule 613(a) and represents a departure from prior Ohio law. Ohio has followed the rule established in Queen Caroline's Case (1820), 129 Eng. Rep. 976. That rule requires the cross-examiner to show the witness his prior written statement before questioning. The rationale of the decision was fairness. See Stern and Grosh, A Visit with Queen Caroline: Her Trial and its Rule, 6 Cap. U.L. Rev. 165 (1977). The rule was abolished by statute in England. Stat. 17 & 18 Vict, c 125, section 25 (1854). The abolition of Queen Caroline's Rule removess an automatic impediment to the cross-examiner. The

provision for disclosing the prior statement to opposing counsel preserves the concept of fairness and protects against abuse of the provision.

Rule 613(B) Extrinsic Evidence of Prior Inconsistent Statement of Witness

Prior Ohio law, as a prerequisite to extrinsic proof, required the laying of a foundation in the cross-examination of the witness, the foundation including the time and place of the statement, the person to whom it was made, advising him as to content, and interrogating him as to whether or not such a statement was made. 56 O. Jur2d Witnesses Sec. 380. Rule 613(B) preconditions admission of a prior inconsistent statement on the witness's opportunity to explain or deny the same and the opposite party's opportunity to interrogate on the statement. The rule does not do away with the necessity of laying a foundation, a procedure most easily accomplished at the time the witness is cross-examined.

> Rule 613(B) differs from the Federal Evidence Rule counterpart in that the witness must be afforded a prior opportunity to explain or deny any previous statements, thus making certain that the witness has had such opportunity before the extrinsic evidence is admitted.

We are of the opinion that the combined effect of Evid. R. 613(a) and Evid. R. 613(b) is that a witness does not have to be shown his prior statement before being questioned about it, but if it is used in an attempt to impeach him by a showing that it is inconsistent then he must be given a prior opportunity to explain. Logically, he must know what it says in order to do so. We borrow the example of the proper procedure, the one given by counsel for appellees: The witness is asked "Wasn't the sky pink on March 8? And if the witness says "No it

wasn't," and this is inconsistent with a prior answer, then the witness is asked "Do you recall being asked some time back 'What color was the sky on March 8?' to which you responded 'It was pink.'" At that point the inconsistency is shown, and either the witness can explain or he can't. On reviewing the record, we find that this was the procedure the court attempted to enforce. The court did not attempt to have appellants show the statements to the witness prior to questioning. We hold the trial court did not commit error.

C.

Appellants argue that "Under (Evidence) Rule 611(b), it is always permissible to inquire into matters affecting the credibility of witnesses, which examination can rightly be

extended to include whatever tends to explain, modify, qualify, discredit, or shed light upon the testimony given." Evid. R. 611(B) states "Cross-examination shall be permitted on all relevant matters and matters affecting credibility."

At trial, during cross-examination of Ralph Blye, a witness called by appellees, appellants attempted to use portions of Mr. Blye's deposition to impeach the credibility of both Blye and K.P. Jones. These portions of Blye's deposition contain questions put to Blye in which appellants' counsel directly reads from Jones' deposition. The trial court would not allow counsel to read these portions of Blye's deposition to Blye at trial. Counsel was attempting to do so in order to show that Blye had been "coached" by appellees' counsel

prior to his deposition by being shown Jones' deposition. Further, counsel stated he was attempting thereby to attack the credibility of both Blye and Jones. We find that this ruling did not limit appellants' cross examination nor did it affect their case. The jury was none the less presented with the significant inconsistencies in Blye's and Jones' versions of events from their in-court testimony. They, therefore, had the ability to weigh the credibility of each and decide who's version, if either, to believe. Although Jones' and Blye's testimony are inconsistent with each other the record indicates that Blye's in-court testimony was consistent with his deposition testimony in regard to this matter. We also emphasize that, as stated in part A above, there is a difference in the ability of appellants

to attack the credibility of Blye and Jones under Evid. R. 607 in that Jones was called by appellants whereas Blye was called by appellees. Further, we see no merit to appellants' contention that the court's ruling prevented them from "making manifest the apparent biases and prejudices" of Jones and Blye. First as to Jones, he was not the witness on the stand. Other that eliciting from the witness on the stand testimony which contradicts Jones', we believe that a party cannot do indirectly and through another witness that which they can not do directly with the first witness. As to Blye, we fail to see how deposition questions and answers as to whether he initiated contact with Jones regarding the viscera findings or vice versa would show his "apparent biases and prejudices" any differently than the

apparent contradictions in the in-court testimony of both him and Jones. Additionally we note that counsel questioned Blye regarding his personal and professional relationships with both appellants. From this, any prejudice and bias could be fully elicited.

Finally as to the propriety or impropriety of Blye having been shown Jones' deposition, we are of the opinion that we do not need to address this issue for the following two reasons: 1. It was not assigned as error, and 2. Any error would be deemed waived due to appellants failure to object on the record. At trial, Wheat's counsel stated with regard to this incident "That happened, and I'm not seriously complaining about it, but that's improper to begin with." In view of this, appeal is not the appropriate

place to begin seriously complaining. As to House of Wheat, its counsel stated several times that unless she indicated differently, she concurred in everything her co-counsel stated. She did not dissent from the above statement.

D.

Appellants argue that "A statement describing or explaining an event made by a declarant while he or she was perceiving it is admissible under (Evidence) Rule 803(1)." Evid. R. 803 provides, in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate

lack of trustworthiness....." Evid. R. 803(1) is to be distinguished from Evid. R. 803(2) dealing with excited utterances. Under Evid. R. 803(1) there is no requirement that the event cause excitement, shock, etc., just that the statement be close in time to the event that the likelihood of reflection, analysis or fabrication is unlikely.

At trial James Jarrett testified that he and his wife were watching WHIO's March 8, 1982, broadcast wherein appellees, while reporting the contents of Dr. Davis' March 4th letter to the State Board, broadcast a videotape picture of a dumpster. Mr. Jarrett testitifed that he recognized this dumpster as being the one located next to and behind the church next door to the House of Wheat. He then identified photographs of the dumpster. After

eliciting testimony regarding his familiarity with that dumpster, Wheat's counsel asked him the following question: "Now, when your wife saw the television, saw the dumpster on television, did she make any statements?" At that point counsel for appellees made a hearsay objection. Wheat's counsel then requested a bench conference wherein he argued to the court that the answer to the question would come within the scope of Evid. R. 803(1). The court, after some discussion about Evid. R. 803(1) and Evid. R. 803(2) disagreed. Wheat's counsel then proffererd, under Evid. R. 103 that if permitted to testify, Mr. Jarrett would state that when the dumpster was shown on television his wife said "that's the dumpster that's located behind the House of Wheat." He would further testify that

they had considerable discussion about that, and that they discussed their impression of the broadcast's meaning with other people. The House of Wheat's counsel joined that proffer and further stated that Mr. Jarrett would have testified that he saw other broadcasts and would state the conclusions he drew from them.

We are of the opinion that the statement "that's the dumpster that's located behind the House of Wheat" made as a dumpster appeared on television, or immediately thereafter is statement describing an event made while the declarant was perceiving the event. Further, we find nothing in Mr. Jarrett's testimony or the proffers to indicate a lack of trustworthiness. We therefore find that it comes within the scope of Evid. R. 803(1), and that the

court erred in excluding the answer to the above question. Despite this, though, we do not see that appellants were prejudiced by this error. The remainder of the proffered testimony would not have come within any hearsay exception and would have been properly excluded as hearsay. Evid. R. 802. Further, as discussed infra, there was other identification of the dumpster. We therefore hold this error to be harmless.

E.

Appellants here argue that "Recorded testimony given at a former criminal trial by an unavailable witness (here a dead police officer) is admissible (either, as non-hearsay or as an exception to the hearsay rule) in a civil trial where there is a substantial identity of the issues to which such

testimony relates."

At trial, Dr. Davis testified that the bags of viscera were discoverred "just up out of the water. Just up on the shore." "On the banks." When asked "They were not 25 to 30 feet from the river, from the water?" He responded "I don't recall if they were. I thought they were -- to the best of my knowledge, they were closer to the river, but they may have been -- they were on the riverbank then." Appellants assail this testimony as having been permitted without his having had personal knowledge of where the bags were found, in violation of Evid. R. 602. We note however, that this objection and a request that the jury either be instructed to disregard this testimony, or be instructed that Dr. David lacked first hand knowledge of

this matter, did not come until later. We therefore find them to be untimely.

Appellants then sought to have admitted into evidence the testimony given at appellants' criminal trial by West Carrollton Police Officer Fred Beard. Appellants stated that Officer Beard had since died, and was therefore unavailable. It appears that Officer Beard was the police officer who retrieved the bags containing the viscera from the river banks. Appellants wished to use this testimony to refute any indication from Dr. Davis's testimony that the viscera had been found <u>in</u> the river. The trial judge refused to admit this criminal trial testimony. Appellants argue this to be error on several grounds.

Appellants initially argue that under Evid. R. 801(D) (1) the criminal

trial testimony is not hearsay. We disagree. This testimony does not come within the rule's provisions: Officer Beard did not testify at this trial, and the prior testimony a. is not inconsistent, b. not offered to rebut a charge of recent fabrication or improper influence or motive, nor c. is not of identification of a person. Under Evid. R. 801(C) it is hearsay. It is an out of court statement by one not testifying, offerd to prove the truth of the matter asserted.

Appellants next argue that if hearsay, the testimony comes within an exception. We disagree. The criminal trial testimony wasn't made while Officer Beard was perceiving the event nor immediately thereafter. It is not a present sense impression Evid. R. 803(1). The testimony is not a public

record or report so as to come within Evid. R. 803(8). Evid. R. 804(B) (1) is the exception allowing former testimony. It covers: "Testimony given as a witness at another hearing...if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony..." Appellants wanted to use this testimony against appellees to show that they defamed appellants by any reference to any bags having been <u>in</u> the river. We are of the opinion that neither the state of Ohio nor appellants can be deemed appellees' predecessor in inteest. Neither had a similar motive as appellees to develop the testimony. We therefore find this exception does not apply.

The only other possible exception

is Evid. R. 804(B)(5). It applys when "The statement was made by a decedent,...where (a) the estate or personal representative of the decedent's estate...is a party, and (b) the statement was made before the death...and (c) the statement is offered to rebut testimony by an adverse party on a matter which was within the knowledge of the decedent...." This exception to the hearsay rule does not apply for two reasons. First, Officer Beard's estate was not a party. Secondly, although the statement was offered to rebut Dr. Davis' testimony, Dr. Davis was not an adverse party, indeed not a party at all.

We therefore hold that the trial court did not err by excluding hearsay testimony which does not fall within any exception to the hearsay rule.

For the above reasons, appellants' eighth assignment of error is not well taken.

At trial, in an effort to show that appellees had violated any privilege they may have had by broadcasting the stories regarding appellants to persons who did not have an interest in the viscera incidents (i.e. "excessive publication") appellants questioned Hurley about WHIO's broadcasting area and market share. Hurley testified that WHIO's broadcasts were capable of being received by approximately 800,000 people in a geographical area consisting of Montgomery, Greene, Clark, Preble, Darke and Warren Counties in Ohio, and Richmond, Indiana. He also mentioned Cincinnati (Hamilton County). He further stated that WHIO's six o'clock news broadcast garnered 40-50 percent of the

Dayton area market. Appellants next asked him "And you strive always to capture a larger share of the market?" It was to this question that appellees objected. At the following bench conference, appellants argued that they wished to show that appellees had exceeded any privilege by broadcasting to e.g. Darke County a matter only of concern to people in Mongomery County. The court disagreed and sustained the objection. Appellants argue to this court that "any evidence as to whom the publication was made was relative to the plaintiff's case and should not have been excluded by the trial judge." Appellees respond simply saying "(i)f news of the investigation into viscera dumping was privileged and in the common interest to the people of Montgomery County, it was also of interest to those

a little ways down the river and to anyone else concerned about public health and hygiene."

We note that while the trial judge stated he did not want "any more testimony along this line," he only did so after the above information had been elicited. The only testimony which we can presume was excluded would be about who in this viewing audience could be deemed proper or improper recipients of these broadcasts.

For the following reason, we hold that a television or radio broadcast cannot be held to have violated any privilege it may have under a theory of excessive publication due to the fact that some persons within its broadcast reception area may not be deemed "proper persons" for the receipt of a communication when others within the

broadcast reception area may be deemed "proper persons." The so-called electronic media lacks the control over the distribution of its publication over a geographical area that the print media has. The print media can distribute to one area while withholding it from another. In this way they can limit their publication to "proper persons." The electronic media, however, cannot exercise such control. Every single person within their broadcasting area with a television or radio is capable of receiving the broadcast. While the print media has a choice to publish to everyone it is capable of reaching, or to certain segments of that population only (and which segments), or to not publish at all, the electronic media has but two choices: 1. Broadcasting the information (which can be received by

everyone in the broadcasting area) 2. Not broadcast it at all. We believe that holding a broadcaster liable for defamation under an excessive publication theory because some segments of the population in its broadcasting area may not be deemed "proper persons" for the receipt of that information (whether they actually receive it or not) where other segments are proper would result in many broadcasters choosing not to broadcast at all. This, we believe, would result in a chilling effect of the broadcaster's First Amendment rights. Further, it would unduly hamper the public's interest in the free flow of information. These interests in our opinion outweigh the interest of the individual defamation plaintiff to recover under a theory of excessive publication.

Accordingly, appellants' ninth assignment is overruled.

Appellant's tenth assignment of error is directed at the court's refusal to compel Wright to answer various questions at trial. For the reasons stated in our discussion of the first assignment of error, we find that the Court did not commit error. Accordingly, the assignment of error is not well taken.

Appellants' eleventh assignment of error is aimed at the exclusion of certain testimony of Sherman Thomas and James Jarrett. Mr. Jarrett's testimony has already been discussed. Had he been permitted to testify, his testimony would have been that he and his wife discussed the broadcast with each other and with other people in the community, and that their common understanding of

the broadcast was that appellees were saying that Wheat and or the House of Wheat regularly used the church's dumpster as a receptacle for body parts back in 1975. Mr. Thomas, a deacon of the church next door to the House of Wheat, testified that he saw the March 8th broadcast. He further testified that he recognized the dumpster shown on television as the church's dumpster. He also stated that the church did not have a dumpster in 1975. He further said that he discussed the broadcast with fifteen to twenty people, and they discussed the church's dumpster being used as a receptacle for body parts. The trial court, however, did not allow Mr. Thomas to testify as to what his impressions or other persons' impressions were as to what the broadcasters were saying. In a proffer made pursuant to Evid. R. 103,

counsel stated that if permitted, Mr. Thomas was expected to testify that church members were concerned over the fact that the church's dumpster had been shown on television and the public had been told that body parts had been placed in it in 1975. They were especially concerned because they knew they didn't have a dumpster in 1975. They were also concerned about what they should do in connection with this "obvious misrepresentation" to the public. Counsel then stated they believed the testimony to be relevant in two respects. One, to rebut Wright's and Nordstrom's testimony that the dumpster shown on television was not the dumpster which belongs to the church next to the House of Wheat. Two, to show that the broadcasts were "of and concerning" appellants.

We find that the court did not err in excluding this testimony. The testimony sought from the witnesses, were subjective impressions or opinions of the broadcast's meaning. We note that this is the ultimate issue to be resolved by the jury -- whether the broadcasts contained falsehoods which defamed appellants. The opinions of these lay witnesses do not come within Evid. R. 701. Appellants argue that they must present evidence of the understanding by members of the viewing audience that the broadcasts defamed appellants, and that the only way to do so is to have people who viewed the broadcasts testify as to their understanding of them. We disagree. We believe their burden is to present evidence of the broadcasts' contents and the falsity thereof, from which the jury

decides if the broadcasts are capable of being reasonably understood in a manner which falsely defames appellants. There is no dispute but that the broadcasts were about the appellants. Both Wheat and the House of Wheat were clearly named and shown. This distinguishes the present case from Robinson v. Guy Gannett Publishing Co. (D. Me. 1969), 297 F. Supp. 722 and Fetler v. Houghton (C.A. 2, 1966), 364 F. 2d 650 cited by appellants in their briefs. The court's ruling in no way infringes on appellants' abilities to support their burden of proof. As to the rebuttal of Wright's and Nordstrom's testimony that this was not the dumpster shown, both Mr. Thomas and Mr. Jarrett, from both the videotape of the broadcast and still photographs, positively identified the dumpster shown on the television as the

church's dumpster. Their testimony as to other persons' recognition of this dumpster would be a classic example of hearsay. We find this assignment to be without merit.

In the twelfth assignment of error, appellants argue that the court erred in not finding as a matter of law that the broadcasts were libelous per se, i.e. on their face, and in determining that if the statements were defamatory, it was on a per quod, i.e. by innuendo, theory. Further they state that the court erred by requiring them to prove their damages as well as fault and malice on the part of appellants. For the following reasons, we now hold that the court did not err.

The difference between per se and per quod is explained in the syllabus of Becker v. Toulmin (1956), 165 Ohio St.

549. There, the Ohio Supreme Court stated the following:

> 1. Where the words of a publication are not ambiguous or uncertain as to their definition, it is the sole function of the court to determine whether such words constitute libel per se, and it is error to leave such question to a jury.
> 2. Where the words of a publication are not of themselves libelous but are claimed to be so by innuendo, it is for the court to determine whether such words may reasonably be construed as constituting libel per quod so as to present a jury question as to their meaning.
> 3. If the language of a publication is suspectible of an innocent interpretation, it can not be libelous per se even though it is also susceptible of a libelous interpretation.
>
> 4. Where the words of a publication are not libelous per se but are claimed to be so by innuendo, such words can only constitute libel per

> quod and are not actionable in the absence of proof or special damages to the one claiming to be libeled.

Appellants argue that the broadcasts constitute libel per se because they fit into two of the "traditional per se categories": 1. Appellees accused appellants of committing criminal offenses; 2. Appellees accused appellants of improper business activities in a manner so as to harm appellants' business and profession.

We believe this argument misstates what the broadcasts state on their face. In their broadcasts, appellants reported that bags of viscera had been found on the banks of the Great Miami River; that the Coroner was investigating the matter; that the Prosecuting Attorney was considering whether to bring

charges, and if so what charge; that sources had identified the House of Wheat as the subject of this investigation; that the evidence accumulated in this investigation implicated the House of Wheat; that improper disposal of organs could constitute either a misdemeanor or a felony; that the Coroner had made serious accusations against appellants in the form of a letter to the State Board; and the contents of that letter. We hold that the trial court did not err in his opinion that appellants did not in their broadcasts directly accuse appellants, or either of them, of improper business activity or of committing a crime, which would be libelous per se. We note that that does not mean that a jury could not find that appellees defamed appellants by

implication or innuendo, i.e. under a per quod theory.

In addition to our discussion above, we find that for practical purposes the distinction between per se and per quod has largely been eliminated. Formerly, if a statement were libelous per se, a plaintiff was entitled to recovery without proof of fault or damages. Further, when words were actionable per se, malice was implied. See: Westropp v. The E.W. Scripps Co. (1947), 148 Ohio St. 365, syllabus. The United States Supreme Court changed this by holding in the case of Gertz v. Robert Welch Inc. (1973), 418 U.S. 323 that the states are free to choose any standard of liability for a publisher or broadcaster of defamatory falsehood which injure a private individual so long as they do

not impose liability without fault. As stated earlier, Ohio has adopted a negligence standard. Embers Supper Club, Inc. v. Scripps-Howard Broadcasting (1984), 9 Ohio St. 3d 22, certiorari denied (1984), 104 S. Ct. 2679, syllabus. An excellent discussion of the effect of Gertz is found in Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co. (1974), 43 Ohio App. 2d 105, certiorari denied (1975), 423 U.S. 883. In that case, the Court of Appeals of Cuyahoga County said the following:

> One clear result of the Gertz decision is that a plaintiff may no longer rely upon the doctrine of libel per se, as it was heretofore recognized in Ohio, to form the basis of a libel suit. This result is mandated by the holding of the Gertz case enunciated in the following two quotes:
>
> (1) "(W)e hold that the states may not permit recovery of presumed or

punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Gertz, supra, at 810.

(2) "We hold that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standards of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual." Gertz, supra, at 809.

Prior to the two pronouncements quoted above, a private individual could make out a prima facie case of libel per se by showing that the defendant published a false statement concerning the plaintiff, and that the false statement was defamatory on its face. General damages were presumed, as was the malice of the publisher. The publisher's belief in the truth of the false publication, even if based on probable cause was not a defense, although such belief could be considered to mitigate damages.

Wilson v. Apple (1827), 3 Ohio 270. The degree of care exercised by the publisher to ascertain the truth of the defamatory statement was irrelevant.

Therefore, libel per se is a doctrine which permits a finding of liability without proof of fault in the sense that malice is presumed and belief in the truth of the published statement, even if based upon reasonable diligence to ascertain such truth, is not a defense.

The Gertz decision specifically prohibits the imposition of liability without fault in defamation cases.

We, therefore, hold that a private individual bringing a libel suit based upon a publication which is defamatory on its face must prove not only the publication of such statement but also actual injury, and fault on the part of the publisher. Such fault may consist of either negligent failure to exercise due care, or a greater degree of fault such as express or actual malice.

Id. at 109-110, (footnotes omitted).

Accordingly, we hold that the trial court did not commit error in instructing the jury that: "The plaintiffs have the burden of proof,...by a preponderance of the evidence that a false publication was made by any one or more of the Defendants; two, that any one or more of the Defendants were negligent in making the false publication, and three, that the false publication proximately caused injury or damage to one or more of the plaintiffs." The twelfth assignment of error is overruled.

The thirteenth assignment of error criticizes the court's instruction on the subject of defamation. Appellants argue that by instructing the jury that "libel is a written defamation," the court in effect directed a verdict for

appellees since there were no writings published by appellees. Initially we note that appellants did not object to this instruction on the record. They cannot raise it for the first time on appeal. Additionally, we find that the assignment and its supporting argument takes the court's statement entirely out of context. Immediately after he instructed the jury on the elements Wheat and House of Wheat had to prove (which we set out in full at the end of part XI of this opinion, supra), the court defined these elements for the jury as follows in part: "Defamation is a false publication causing injury to a person's or corporation's reputation or exposing them to public hatred, contempt, ridicule, shame, disgrace, or affecting them adversely in their trade or business. "Libel has been referred to

several times, and there is a close connection between libel and defamation. We have omitted the word slander. Slander usually refers to oral statements and libel to written statements, but at any rate, libel is a written defamation." The remainder of the jury charge used "defamation," "defame," etc. The court was merely explaining a term the jury may have heard. the court was not instructing the jury that they must find a written defamation. This assignment of error is meritless.

The apellants have divided their fourteenth assignment of error into two parts. We will discuss these in order.

A.

Appellants argue that the court erred in instructing the jury that should they find appellees were

negligent, they should consider whether the broadcasts were privileged as provided in R.C. 2317.04. For the reasons stated in part IV of this opinion, we hold that the trial court did not err in giving this instruction.

B.

Here, appellants are primarily attacking the Court's instruction to the jury that if they find appellees were negligent they nonetheless cannot be held liable if they prove that they and the public share a common interest and the publication was reasonably calculated to protect or further that interest. In essence, this instruction refers to a common law privilege of "neutral reportage." This privilege was established in Edwards v. National Audubon Society, Inc. (C.A. 2, 1977), 556 F.2d 113, certiorari denied (1977),

434 U.S. 1002. There, an audubon society officer printed accusations against unnamed persons in the society's magazine. These accusations generated some interest, and a reporter from the New York Times inquired about these persons identities. The audubon society officer then named specific persons, including Edwards, a public figure. Edwards sued both the audubon society nd the New York Times. The court, in allowing a privilege for the New York Times said "when a responsible, prominent organization, like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of these charges, regardless of the reporter's private views regarding their validity. ...What is newsworthy about these

accusations is that they were made.... The public interest in being fully informed about such controversies that rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.... (W)e must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made, ...(however), (i)t is equally clear...that a publisher who in fact espouses or concurs in the charges...or who deliberately distorts these statements...cannot rely on a privilege of neutral reportage...(instead he) assumes responsibility for the underlying accusations...." Id. at 120-122. Although Edwards was a public figure whereas appellants are private

figures, we believe these principles still apply. See J.V. Peters & Co. Inc. et al. v. Knight Ridder Co., et al. (March 21, 1984) Summit County App. No. 11335 (unreported). Here the County Coroner, Dr. Davis, an elected public official, was making serious accusations about appellants to the governmental agency charged with licensing and regulating them. Additionally he was asking that the agency take drastic action toward them. Further, he was conducting his own investigation, and asking the Prosecuting Attorney to initiate criminal action. All of this is certainly newsworthy and a matter of public concern. We believe the public has the right to know about these actions by the Coroner and further, about the party or parties being accused.

As stated in our discussion of the fourth assignment of error, we believe a legitimate jury question existed as to whether these broadcasts were fair and impartial reports, especially in view of the various inaccuracies. We hold the court did not err in putting these issues before the jury and instructing them they could find the broadcasts to be privileged if appellees acted in good faith, the reports were of common interest, limited in scope and purpose, required by a proper occasion, and published to the proper parties.

Finally, we wish to note that the jury verdict in this case was a general verdict in favor of appellees. It does not appear that either special verdicts or interrogatories were requested. We therefore do not know whether the jury found simply that the appellees were not

negligent; or that they were negligent but one or more privilege applied, and if so, then which. "It is well settled in Ohio that where the jury returns a general verdict in a case involving two or more issues, a finding upon any one of which in favor of the successful party would entitle him to judgment, if the record does not disclose affirmatively by answers to interrogatories or otherwise upon which issue such verdict was based, the judgment will not be reversed if no error appears as to any one or more of them although there may be error as to other issues." 5 Ohio Jurisprudence 3d (1978) 226, Appellate Review, Section 614. We cannot find that appellants were prejudiced. Accordingly, this assignment of error is overruled.

Appellants fifteenth assignment of

error is based on the refusal of the trial court to instruct the jury that one who repeats or republishes a defamatory statement is as liable for the defamation as the one who originally made the statement. Appellants argue that appellees seek to avoid liability by simply stating that they were not making the statement, but were repeating another's statement. We believe that this over simplifies the issues, defenses and instructions. The jury was instructed to examine appellees broadcasts. These are appellees' statements. The statements stand on their own. It is obvious throughout that appellees were repeating information gotten from sources -- some identified, some not. The questions put to the jury were whether repeating this information was negligent and if so, whether any

were privileged. We find nothing in the court's instructions which indicates that the jury could find for appellees simply because they quoted or attributed statements to others. Rather, they were instructed to the contrary. Looking at the jury charge as a whole, we find that a republication instruction would have been unnecessary, redundant, and possibly confusing. We hold that the trial court did not err in not giving one. Accordingly, appellants' fifteenth assignment of error is not well taken.

The judgment of the trial court is therefore affirmed.

.....

KERNS, J., and WILSON, J., concur.

Copies mailed to:

James R. Willis
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David C. Greer
Hon. Robert M. Brown
Hon. Rodney M. Love

SUPREME COURT OF THE UNITED STATES

No. A-922

WAYNE WHEAT AND HOUSE OF WHEAT, INC.,

Applicants,

v.

CLIFF WRIGHT, ET AL.,

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s), IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 7, 19 86.

/s/ Sandra O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 30th day of May, 19 86.

Addendum "C"

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT - UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

REVISED CODE OF OHIO

§2317.04 - Impartial Report Of Proceedings Privileged.

The publication of a fair and impartial report of the proceedings before state or municipal legislative bodies, or before state or municipal

executive bodies, boards, or officers, or the whole or a fair synopsis of any bill, ordinance, report, resolution, bulletin, notice, petition, or other document presented, filed, or issued in any proceeding before such legislative or executive body, board, or officer, shall be privileged, unless it is proved that such publication was made maliciously.

§2739.04 - Revelation Of News Source By Broadcasters.

No person engaged in the work of, or connected with, or employed by any commercial radio broadcasting station, or any commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news shall be

required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

Every commerical radio broadcasting station and every commercial television broadcasting station shall maintain for a period of six months from the date of its broadcast thereof, a record of those statements of information the source of which was procured or obtained by persons employed by the station in gathering, procuring compiling, editing,

disseminating, publishing or broadcasting news.

Record as used in this section shall include a tape, disc, script or any other item or document which sets forth the content of the statements which are required by this section to be recorded.

NO. 86-362

FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HOUSE OF WHEAT
and
WAYNE WHEAT,

Petitioners,

v.

CLIFF WRIGHT, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS FOR MONTGOMERY COUNTY, STATE OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

SHOULD THIS COURT ASSUME JURISDICTION OVER A CASE BY GRANT OF A WRIT FOR CERTIORARI TO THE SUPREME COURT OF A SOVEREIGN STATE WHERE THE DECISION OF THE STATE COURT IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS, AND WHERE THE PETITION FAILS TO ASSERT A STATUTORY BASIS FOR JURISDICTION AND FAILS TO SET UP A CLAIM UNDER THE CONSTITUTION, TREATIES OR STATUTES OF THE UNITED STATES?

The respondents submit that this question should be answered in the negative, and respectfully request that this Court deny the petition for writ of certiorari seeking review of the entry of record in the Supreme Court of Ohio.

LIST OF PARTIES AND RULE 28.1 STATEMENT OF AFFILIATED CORPORATIONS

The parties to the proceedings below and the parties before this Court are petitioners Wayne Wheat and House of Wheat, and respondents Clifford Wright, Jack Hurley, Richard Nordstrom, Miami Valley Broadcasting Corporation and its television station WHIO-TV.

Miami Valley Broadcasting Corporation is a wholly owned subsidiary of Cox Communications, Inc., which in turn is a wholly owned subsidiary of Cox Enterprises, Inc., a privately held corporation. The only affiliates of Miami Valley Broadcasting Corporation (i.e., other subsidiaries of Cox Enterprises, Inc., or its wholly owned subsidiaries) which are not wholly owned or controlled by Cox Enterprises, Inc., are: TeleRep, Incorporated; CyberTel Corporation; The Landsburg Company; Cox Cable New Orleans, Inc.; Cox Cable Spokane, Inc.; Cox Cable New York, Inc.; Cox Cable Cranston/Johnston, Inc.; Cox Cable Oklahoma City, Inc.; and Datext, Inc.

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STATEMENT OF THE CASE

This case arises from highly newsworthy events. On July 19, 1981, school children playing along the banks of the Great Miami River near Dayton, Ohio discovered several plastic autopsy sacks containing human viscera. The children placed the viscera in a plastic pail and carried them to the local police department. Police needed assistance in determining whether the viscera were human organs, as opposed to those of animals. The Montgomery County Coroner was contacted, and soon other law enforcement agencies and the County Prosecutor became involved in the investigation.

By the time respondents' television broadcasts were made, these public officials and others had been investigating the "viscera incident" for more than seven months. Due to a peculiar combination of three ideopathic diseases, forensic pathologists were able to trace the viscera to Delma Shine, who had passed away at a local hospital on July 13, 1981. Her internal organs had been embalmed and were therefore preserved when found by the children. The parties to this lawsuit have stipulated that the viscera found on the banks of the Great Miami River were to a medical certainty those of Delma Shine.

The hospital was quickly ruled out of suspicion since viscera are only embalmed at funeral homes, never at hospitals. The House of Wheat Funeral Home had embalmed and buried Delma Shine. A Wheat employee had picked up her viscera and corpse from the hospital.

After the viscera discovery, the Coroner's office was contacted by a former president of the Ohio Funeral Directors Association, who advised that in 1975 the

Association received a complaint from a former Wheat apprentice who had personally been instructed by Wayne Wheat to place body parts in a dumpster. The Coroner considered this to be evidence of prior similar acts and significant evidence of improper practices. In more than twenty years with the office, Prosecuting Attorney Lee C. Falke had never encountered a case involving dumped human viscera.

News of the "organ dumping incident" spread through the ranks of the funeral business for months before the story hit the press. The Greater Montgomery County Funeral Directors Association initiated conversations with the Prosecutor to do something about "highly unethical, abhorrent and disgusting" practices. Funeral directors called the media to inform that the Coroner was investigating the incident. By early March, 1982 the Coroner's office was being pressured by the public with requests for information.

Petitioners were not identified by name in press statements of the Prosecutor or Coroner, who were gathering evidence to seek felony indictments. At no time, however, did public authorities suspect that any entities other than petitioners were responsible for the viscera dumping.

On March 2, 1982 respondents Cliff Wright and Richard Nordstrum visited Wayne Wheat at the House of Wheat. Mr. Wheat immediately recognized respondents as television personalities and consented to be interviewed. The television broadcast that evening reported that the House of Wheat was under investigation. The broadcast included the filmed interview with Wheat, who denied that he or anyone in his organization had improperly disposed of human parts.

The Prosecutor was relieved when the media finally

identified the House of Wheat, since other funeral homes were being unfairly accused. The Prosecutor was reluctant to seek an indictment without more evidence. In April, 1982 the body of Mrs. Shine was exhumed. Her body cavities were empty of viscera, but were stuffed with packing paper and hardening compound.

Wayne Wheat and the House of Wheat were indicted. The Wheat case received considerable public attention for months. A unanimous jury found the House of Wheat guilty of gross abuse of a corpse. The criminal trial judge set aside the jury verdict. The court's ruling was not appealed.

On April 1, 1982 petitioners filed civil complaints against the respondent television station and three employees. The complaint alleged that broadcasts concerning the investigation of the Coroner and Prosecuting Attorney were defamatory, invaded Wayne Wheat's right to privacy, and were calculated to interfere with petitioners' business. The amended complaint sought 106 million dollars.

The trial court sustained motions for summary judgment as they related to claims of invasion of privacy, interference with business relations, and punitive damages. The case was tried with respect to claims of defamation commencing September 19, 1983 and submitted to the jury October 1, 1983. On the same day the jury returned a unanimous verdict against House of Wheat and a verdict against Wayne Wheat and in favor of respondents.

The Ohio Court of Appeals affirmed the judgment of the trial court on October 10, 1985. The Supreme Court of Ohio refused to certify the record for review on April 9, 1986, also dismissing the appeal for the reason that no substantial constitutional question exists in the record.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS FAIL TO ASSERT A STATUTORY BASIS FOR JURISDICTION.

Petitioners argue "jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(17)" (Petition, p. 3). There is no subsection (17) to 28 U.S.C. § 1254. Section 1254 permits for certiorari from a federal court of appeal. This case, however, issues from the highest court of the State of Ohio, and has never been in the federal court system.

Under certain circumstances, review of an Ohio Supreme Court decision by certiorari may properly be invoked under 28 U.S.C. § 1257. The Court should not be required to guess the claimed statutory basis in order to determine jurisdiction. The Petition for Writ of Certiorari should be denied for lack of jurisdiction.

II. PETITIONERS FAIL TO DEMONSTRATE THAT A FEDERAL QUESTION WAS RAISED IN THE COURTS BELOW.

In seeking review of a state court judgment, petitioners' statement of the case must specify the stage in the proceedings where federal questions were first raised, the manner and method of raising them, the way they were passed upon by the state court, and quotations from specific portions of the record that will demonstrate that a federal question was timely and properly raised. Petitioners fail to demonstrate that any federal questions were raised in the courts of Ohio. Petitioners cannot show that any federal questions were raised to give this Court jurisdiction on writ of certiorari. Sup. Ct. R. 21(h).

III. PETITIONERS FAIL TO SET UP A CLAIM UNDER THE CONSTITUTION, TREATIES OR STATUTES OF THE UNITED STATES. 28 U.S.C. § 1257.

A. Petitioners' Due Process Claim Was Not Properly Raised Or Considered In State Courts As A Federal Question.

Petitioners argue that the ruling of the Ohio court upholding respondents' statutory privilege of nondisclosure of news sources is a denial of the "constitutional right of due process" (Petition, p. 17). An averment that due process rights have been violated, without reference to the Constitution of the United States and "asserting no express rights thereunder," is solely referable to the state's constitution and affords no basis whatever for invoking the jurisdiction of this Court. *Bowe* v. *Scott*, 233 U.S. 658, 664-65 (1914).

The Ohio Constitution guarantees the right to "due course of law." Ohio Const. art. I, sec. 16. Ohio courts have ruled that "due course of law" is parallel in meaning to the "due process of law" phrase of the Fourteenth Amendment to the United States Constitution. *Columbus* v. *New*, 1 Ohio St. 3d 221, 223, 438 N.E.2d 1155 (1982); *Bernhardt* v. *Linzell*, 104 Ohio App. 243, 148 N.E.2d 242 (1957). Therefore, petitioners' averment is referable only to the Ohio Constitution and not to the United States Constitution.

Petitioners aver no other constitutional violation as a basis for granting the writ. Because the petition alleges only a state constitutional violation, this Court has no basis for exercising its jurisdiction and the writ must be denied.

B. Petitioners Present No Substantial Question Of Federal Law.

Petitioners propose that a "false light" cause of action can be maintained without proof of "actual malice." This argument raises no federal question.

Whether a state should adopt the "false light" theory of recovery for tortious invasion of privacy is entirely a matter of substantive state law. The Ohio Supreme Court has expressly declined to adopt this theory of recovery. *Yeager* v. *Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983). Since the *Erie* decision repudiated the view that federal courts are free to expound the "general" law, this Court has followed the rule that, except in matters governed by the federal Constitution or federal statutes, the substantive law to be applied in any case is the law of the state. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

Petitioners also urge this Court to adjust Ohio judicial and statutory remedies for recovery from injury to reputation. This Court has held that the interest in one's reputation is "simply one of a number which the state may protect against injury by virtue of its tort law." *Paul* v. *Davis*, 424 U.S. 693, 712. The states have the right to create defamation actions, to not create defamation actions, or to remove such actions through testimonial privilege. *See, e.g., Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264 (3d Cir. 1980); *Mazzella* v. *Philadelphia Newspapers*, 479 F. Supp. 523, 528 (E.D.N.Y. 1979).

Petitioners question whether the respondent reporters should have been protected by Ohio's statutory and common law privileges which protect them from defamation actions when the allegedly defamatory statements concern newsworthy events or public proceedings.

Petitioners ask this Court to determine whether Ohio courts have properly applied state statutes with respect to facts of this case.

This Court does not undertake to determine the effect or construction of state statutes independent of treatment which the state itself has accorded to such statutes. *Fidelity Trust Co.* v. *Field*, 311 U.S. 169, 178 (1940). Further, this Court does not exert its jurisdiction merely to review a decision of a state court upon questions of fact. *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952); *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925); *Portland Rail Co.* v. *Railroad Commission*, 229 U.S. 397, 412 (1913).

Petitioners further argue an Ohio statute which shields reporters from forced divulgence of news sources denies due process rights. This Court has reasoned that: "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Branzburg* v. *Hayes*, 408 U.S. 665, 706 (1972). Under prevailing legal doctrines, Ohio is free to confer an absolute privilege upon reporters not to disclose their news sources in defamation actions.

IV. THE DECISIONS OF THE OHIO COURTS ARE BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

Where a state court judgment is supported by a state law ground that is both adequate and independent of any federal questions raised in the proceedings, this Court has no jurisdiction to review the case. *See, e.g., Michigan* v. *Long*, 463 U.S. 1032 (1983); *Ridgway* v. *Ridgway*, 454 U.S. 46, 54 (1981); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935); *Berea College* v. *Kentucky*, 211 U.S. 45, 53 (1908); *Klinger* v. *Missouri*, 13 Wall. 257, 263 (1871). A petitioner must show that a federal question was presented to the state court and that a decision on the federal question was necessary to a determination of the cause. *See William* v. *Kaiser*, 325 U.S. 471, 477-78 (1945); *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934). A petitioner must demonstrate that state grounds cannot account for the state court decision. *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956). If neither of these are shown, it has been this Court's practice to decline jurisdiction. *Lynch* v. *New York ex rel. Pierson*, 293 U.S. at 54-55; *Adams* v. *Russell*, 229 U.S. 353, 358-59 (1913).

All issues which petitioners raise dealing with false light claims and the scope of respondents' privileges were decided either on the basis of Ohio common law or state judicial construction of Ohio statutes. The Ohio Supreme Court has determined that there is no justification for further review of this case (Addendum "A").

V. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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